

1-6-2015

Kesting v. Kesting Clerk's Record Dckt. 42875

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Kesting v. Kesting Clerk's Record Dckt. 42875" (2015). *Idaho Supreme Court Records & Briefs*. 5680.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/5680

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

LINDA C. KESTING,

Plaintiff-Appellant,

vs.

JAMES A. KESTING,

Defendant-Respondent.

Supreme Court Case No. 42875

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE GERALD F. SCHROEDER

STANLEY W. WELSH

ATTORNEY FOR APPELLANT

BOISE, IDAHO

C. THOMAS ARKOOSH

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Linda C Kesting vs. James A Kesting

Date	Code	User		Judge
1/7/2014	NCOC	TCRUDZES	New Case Filed - Other Claims	Patricia Young
	COMP	TCRUDZES	Complaint Filed	Patricia Young
	SMFI	TCRUDZES	Summons Filed	Patricia Young
1/15/2014	AFOS	CCHEATJL	Affidavit Of Service 01.09.2014	Patricia Young
1/24/2014	ANSW	TCLAFFSD	Answer (James Pro Se)	Patricia Young
1/29/2014	MOTN	CCHEATJL	Motion For Judgment On The Pleadings	Patricia Young
	MEMO	CCHEATJL	Memorandum In Support Of Motion For Judgment On The Pleadings	Patricia Young
	HRSC	CCHEATJL	Notice Of Hearing Scheduled (Motion 02/18/2014 11:00 AM) Motion for Judgment On Pleadings	Patricia Young
2/18/2014	HRHD	CCPRICDL	Hearing result for Motion scheduled on 02/18/2014 11:00 AM: Hearing Held Motion for Judgment On Pleadings	Patricia Young
2/19/2014	MEMC	CCNELSRF	Memorandum Of Costs And Attorney Fees	Patricia Young
2/28/2014	ORDR	CCMACKLM	Order Granting Motion for Judgment on the Pleadings	Patricia Young
	AMNT	CCMACKLM	Judgment \$8000.00	Patricia Young
	CDIS	CCMACKLM	Civil Disposition entered for: Kesting, James A, Defendant; Kesting, Linda C, Plaintiff. Filing date: 2/28/2014	Patricia Young
	STAT	CCMACKLM	STATUS CHANGED: Closed	Patricia Young
3/24/2014	AFFD	CCOSBODK	Affidavit Of Matt Schelstrate Re Interest Calculation For Writ	Patricia Young
3/27/2014	ORDR	CCTOMPMA	Order for Attorney Fees and Costs	Patricia Young
	JDMT	CCTOMPMA	Judgment - \$1227.80	Patricia Young
4/2/2014	AFFD	CCSCOTDL	Amended Affidavit of Matt Schelstrate re interest calculation for Writ of Execution	Patricia Young
4/3/2014	EXAC	CCJACKKS	Execution Issued - Ada Co.	Patricia Young
4/24/2014	SRWW	CCMARTJD	Sheriffs Return On Writ & Writ	Patricia Young
4/28/2014	APPL	CCHEATJL	Application OFr Order For Debtor's Examination Of Defendant	Patricia Young
	AFCO	CCHEATJL	Affidavit Of Counsel In Support Of Application For Order For Debtor's Examination Of Defendant	Patricia Young
	SHRT	CCHEATJL	Sheriff's Return 04.07.14	Patricia Young
4/30/2014	DEBI	CCREIDMA	Debtors Exam Issued (6/24/14 @ 3:30 pm)	Patricia Young
	HRSC	CCREIDMA	Hearing Scheduled (Debtors Examination 06/24/2014 03:30 PM)	Patricia Young
	STAT	CCREIDMA	STATUS CHANGED: Closed pending clerk action	Patricia Young
5/29/2014	MOTN	CCMCLAPM	Motion for entry of Qualified Domestic Relations Order	Patricia Young

Linda C Kesting vs. James A Kesting

Date	Code	User	Judge
5/29/2014	AFSM	CCMCLAPM	Affidavit of Counsel In Support Of Plaintiffs Motion for Entry of Qualified Domestic Relations Order
	MEMO	CCMCLAPM	Supplemental Memorandum of Attorneys Fees and Costs
6/5/2014	NOHG	CCMURPST	Notice Of Hearing (06/24/2014 3:45 p.m.)
	HRSC	CCMURPST	Hearing Scheduled (Motion 06/24/2014 03:45 AM) Plaintiff's Motion for Entry of Qualified Domestic Relations Order
6/12/2014	NOAP	CCTHIEKJ	Notice Of Appearance (Arkoosh for James Kesting)
6/17/2014	MOTN	CCMARTJD	Ex Parte Motion to Continue
	AFFD	CCMARTJD	Affidavit in Support of Ex Parte Motion to Continue Hearing
	MOTN	CCMARTJD	Ex Parte Motion to Shorten Time
	AFFD	CCMARTJD	Affidavit in Support of Ex Parte Motion to Shorten Time
	MEMO	CCHOLMEE	Memorandum in Support of Motion for Entry of QDRO
6/18/2014	CONT	CCPRICDL	Continued (Motion 06/25/2014 01:30 PM) Plaintiff's Motion for Entry of Qualified Domestic Relations Order
6/20/2014	MEMO	CCMCLAPM	Respondents Memorandum in Opposition to Motion for Entry of Qualified Domestic Relations Order
6/23/2014	REPL	TCLAFFSD	Reply Memorandum In Support Of Motion For Entry Of Qualified Domestic Relations Order
6/24/2014	HRHD	CCPRICDL	Hearing result for Debtors Examination scheduled on 06/24/2014 03:30 PM: Hearing Held
6/25/2014	HRHD	CCPRICDL	Hearing result for Motion scheduled on 06/25/2014 01:30 PM: Hearing Held Plaintiff's Motion for Entry of Qualified Domestic Relations Order
	STAT	CCPRICDL	STATUS CHANGED: closed
	AFFD	CCSCOTDL	Affidavit of Nikeela Black in Support of Motion requesting Permission to File Objection to Petitioners Supplemental Memorandum for Attorney fees and costs
		CCSCOTDL	Affidavit of Nikeela Black in Support of Motion requesting Permission to File Objection to Petitioners Supplemental Memorandum for Attorney fees and costs
	JDMT	CCPRICDL	Judgment on Qualified Domestic Relations Order
6/26/2014	OBJT	CCTHIEKJ	Objection to Motion for Permission to File Objection to Petitioner's Supplemental Fees and Costs

Linda C Kesting vs. James A Kesting

Date	Code	User		Judge
7/2/2014	MEMO	CCTHIEKJ	Second Memorandum of Attorney Fees and Costs	Patricia Young
7/7/2014	OBJT	CCREIDMA	Objection to Petitioner's Supplemental Memorandum For Attorneys Fees and Second Memorandum of Attorneys Fees and Costs; Motion to Disallow; and Affidavit of Attorney	Patricia Young
7/10/2014	APDC	CCBARRSA	Appeal Filed In District Court	Patricia Young
	CAAP	CCBARRSA	Case Appealed:	Patricia Young
	STAT	CCBARRSA	STATUS CHANGED: Reopened	Patricia Young
7/11/2014	CHGA	CCBARRSA	Judge Change: Administrative	Gerald Schroeder
	NOTR	CCBARRSA	Notice Of Reassignment	Gerald Schroeder
7/16/2014	MOTN	TCLAFFSD	Motion For Stay of Judgment Pending Appeal	Gerald Schroeder
	MEMO	TCLAFFSD	Memorandum In Support Of Motion For Stay Of Judgment Pending Appeal	Gerald Schroeder
	AFFD	CCVIDASL	Affidavit of Nikeela Black in Support of Motion for Stay of Judgment Pending Appeal	Gerald Schroeder
	NOTH	CCRADTER	Notice Of Hearing 8.19.14 @ 3 pm	Patricia Young
	HRSC	CCRADTER	Hearing Scheduled (Hearing Scheduled 08/19/2014 03:00 PM) Plaintiff's Supplemental Memorandum for Attorney's Fees and Costs and Plaintiff's Second Memorandum for Attorney's Fees and Costs	Gerald Schroeder
	ESTM	TCPAANMR	Estimate Of Appeal Transcript Cost	Gerald Schroeder
7/22/2014	NOHG	CCTHIEKJ	Notice Of Hearing (8-12-14 @ 3:00pm)	Gerald Schroeder
	HRSC	CCTHIEKJ	Hearing Scheduled (Motion 08/12/2014 03:00 PM) Motion for Stay of Judgment Pending Appeal	Gerald Schroeder
7/23/2014	AFFD	TCMEREKV	Affidavit Of James Kesting In Support Of Motion For Stay Of Judgment Pending Appeal	Gerald Schroeder
7/24/2014	MOTN	CCNELSRF	Motion to Waive Transcripts on Appeal	Gerald Schroeder
	MOTN	CCGARCOS	Motion to Waive Transcript on Appeal	Gerald Schroeder
	ORDR	CCNELSRF	Order Waiving Transcript on Appeal	Gerald Schroeder
	ORDR	CCNELSRF	Order Governing Proceedure on Appeal	Gerald Schroeder
8/5/2014	OBJE	CCRADTER	Objection to Motion For Stay of Judgment Pending Appeal	Gerald Schroeder
8/7/2014	MISC	TCMEREKV	Response To Objection To Motion For Stay Of Judgment Pending Appeal	Gerald Schroeder
8/13/2014	HRHD	CCPRICDL	Hearing result for Motion scheduled on 08/12/2014 03:00 PM: Hearing Held Motion for Stay of Judgment Pending Appeal	Patricia Young
8/19/2014	DECL	TCLAFFSD	Declaration Of Counsel In Support of Plaintiff's Supplemental Memorandum And Second Memorandum For Attorney's Fees	Gerald Schroeder

Linda C Kesting vs. James A Kesting

Date	Code	User	Judge
8/19/2014	HRHD	CCPRICDL	Hearing result for Hearing Scheduled scheduled on 08/19/2014 03:00 PM: Hearing Held Plaintiff's Supplemental Memorandum for Attorney's Fees and Costs and Plaintiff's Second Memorandum for Attorney's Fees and Costs Patricia Young
8/27/2014	JDMT	CCPRICDL	Judgment \$1859.50 Gerald Schroeder
	ORDR	CCPRICDL	Order for Attorney Fees Gerald Schroeder
8/28/2014	ORDR	CCRADTER	Order Granting Stay of Judgment of Qualified Domestic Relations Order Gerald Schroeder
	ORDR	CCRADTER	Order for Attorney's Fees Gerald Schroeder
	JDMT	CCRADTER	Judgment for Attorney's Fees \$2498 Gerald Schroeder
	CDIS	CCRADTER	Civil Disposition entered for: Kesting, James A, Defendant; Kesting, Linda C, Plaintiff. Filing date: 8/28/2014 Gerald Schroeder
	STAT	CCRADTER	STATUS CHANGED: Closed Gerald Schroeder
	BREF	CCRADTER	Appellant's Brief Gerald Schroeder
9/25/2014	BREF	CCTHIEKJ	Respondent's Brief Gerald Schroeder
	MOTN	CCMURPST	Motion to Augment the Record Gerald Schroeder
	AFFD	CCMURPST	Affidavit of Counsel in Support of Motion to Augment the Record Gerald Schroeder
9/30/2014	OBJE	TCMEREKV	Objection To Petitioner's Motion To Augment The Record Gerald Schroeder
10/1/2014	HRSC	CCNELSRF	Hearing Scheduled (Hearing Scheduled 10/16/2014 02:00 PM) Objection to Motion to Augment Gerald Schroeder
		CCNELSRF	Notice of Hearing Gerald Schroeder
10/9/2014	RSPN	CCHEATJL	Response To Objection To Motion To Augment Record Gerald Schroeder
10/16/2014	DCHH	CCNELSRF	Hearing result for Hearing Scheduled scheduled on 10/16/2014 02:00 PM: District Court Hearing Held Court Reporter: c. valcich Number of Transcript Pages for this hearing estimated: Less than 100 pages Objection to Motion to Augment Gerald Schroeder
	HRSC	CCNELSRF	Hearing Scheduled (Oral Argument on Appeal 11/20/2014 01:30 PM) Gerald Schroeder
		CCNELSRF	Notice of Hearing 11/20 @1:30 Gerald Schroeder
	BREF	CCWATSCL	Appellant's Reply Brief Gerald Schroeder
10/22/2014	NOSV	CCBOYIDR	Notice Of Service Gerald Schroeder
11/5/2014	CONT	CCNELSRF	Continued (Oral Argument on Appeal 12/04/2014 01:30 PM) Gerald Schroeder
		CCNELSRF	Amended Notice of Hearing 12/04/ @ 1:30 Gerald Schroeder

000005

Linda C Kesting vs. James A Kesting

Date	Code	User		Judge
12/4/2014	DCHH	CCNELSRF	Hearing result for Oral Argument on Appeal scheduled on 12/04/2014 01:30 PM: District Court Hearing Held Court Reporter: gosney Number of Transcript Pages for this hearing estimated: less than 500	Gerald Schroeder
12/9/2014	NOTS	CCRADTER	Notice Of Service	Gerald Schroeder
12/29/2014	DEOP	CCNELSRF	Opinion on Appeal	Gerald Schroeder
	CDIS	CCNELSRF	Civil Disposition entered for: Kesting, James A, Defendant; Kesting, Linda C, Plaintiff. Filing date: 12/29/2014	Gerald Schroeder
	STAT	CCNELSRF	STATUS CHANGED: Closed	Gerald Schroeder
1/7/2015	NOTA	CCJOHNLE	NOTICE OF APPEAL	Gerald Schroeder
	APSC	CCJOHNLE	Appealed To The Supreme Court	Gerald Schroeder
2/10/2015	MOTN	CCHOLDKJ	Motion for Order Restraining Transfer of Property Subject to Pending Appeal	Gerald Schroeder
	DECL	CCHOLDKJ	Declaration of Counsel	Gerald Schroeder
2/11/2015	NOHG	CCHOLDKJ	Notice Of Hearing (2.26.15@1:30pm)	Gerald Schroeder
	HRSC	CCHOLDKJ	Hearing Scheduled (Motion 02/26/2015 01:30 PM) motion for Order Restraining Transfer of Property Subject Pending Appeal	Gerald Schroeder
	STAT	CCHOLDKJ	STATUS CHANGED: Closed pending clerk action	Gerald Schroeder
2/19/2015	RSPS	CCMYERHK	Response To Plaintiff/Appellant's Motion For Order Restraining Transfer Of Property Subject To Pending Appeal	Gerald Schroeder
	AFFD	CCMYERHK	Affidavit Of James Kesting Re: Plaintiff/Appellant's Motion For Order Restraining Transfer Of Property Subject To Pending Appeal	Gerald Schroeder
2/25/2015	HRVC	CCNELSRF	Hearing result for Motion scheduled on 02/26/2015 01:30 PM: Hearing Vacated motion for Order Restraining Transfer of Property Subject Pending Appeal	Gerald Schroeder
	STAT	CCNELSRF	STATUS CHANGED: closed	Gerald Schroeder
3/10/2015	MOTN	TCHOLLJM	Motion For Order For Examination	Gerald Schroeder
	AFSM	TCHOLLJM	Affidavit In Support Of Motion For Order For Examination	Gerald Schroeder
3/17/2015	DEBI	CCREIDMA	Debtors Exam Issued and filed (5/26/15 @ 2:30 PM)	Gerald Schroeder
	HRSC	CCREIDMA	Hearing Scheduled (Debtors Examination 05/26/2015 02:30 PM)	Gerald Schroeder
	STAT	CCREIDMA	STATUS CHANGED: Closed pending clerk action	Gerald Schroeder
4/16/2015	AFOS	TCMEREKV	Affidavit Of Service 4.12.15	Gerald Schroeder
4/28/2015	MOTN	CCMYERHK	Motion To Set Aside Service Of Process	Gerald Schroeder

Date: 5/19/2015

Fourth Judicial District Court - Ada County

User: TCWEGEKE

Time: 09:35 AM

ROA Report

Page 6 of 6

Case: CV-OC-2014-00258 Current Judge: Gerald Schroeder

Linda C Kesting vs. James A Kesting

Linda C Kesting vs. James A Kesting

Date	Code	User		Judge
4/28/2015	AFFD	CCMYERHK	Affidavit Of James A Kesting In Support Of Motion To Set Aside Service Of Process	Gerald Schroeder
	MEMO	CCMYERHK	Memorandum In Support Of Motion To Set Aside Service Of Process	Gerald Schroeder
5/12/2015	AFOS	CCSNELNJ	(2) Affidavit Of Service (5/9/15)	Gerald Schroeder

000007

NO. _____ FILED _____
A.M. _____ P.M. 3:40

JAN - 7 2014

CHRISTOPHER D. RICH, Clerk
By **ELAINE RUDZINSKI**
DEPUTY

STANLEY W. WELSH ISB #1964
COSHO HUMPHREY, LLP
Counselors and Attorneys at Law
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO Box 9518
Boise, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff,

v.

JAMES A. KESTING,

Defendant.

Case No. **CV 00 1400258**

COMPLAINT

Fee Category: A \$96.00

The above named Plaintiff complains and alleges as follows:

I

The parties entered into a contract requiring Defendant to pay to Plaintiff alimony/spousal support.

II

Pursuant to the terms of their contract, Defendant is obligated to pay to Plaintiff the sum of \$1,600 on the first day of each month.

ORIGINAL

III

Defendant has failed to pay the spousal support of \$1,600 due October 1, 2013, \$1,600 due November 1, 2013, \$1,600 due on December 1, 2013, and \$1,600 due January 1, 2013, for a total amount of \$6,400.

IV

Pursuant to the terms of the contract, Defendant is obligated to pay the attorney fees and costs incurred by Plaintiff in this action. If this matter is not contested, Defendant should be ordered to pay to Plaintiff attorney fees in the amount of \$1,000.

WHEREFORE, Plaintiff prays for relief as follows:

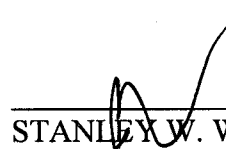
1. For a Judgment against Defendant in the amount of \$6,400.
2. For an award of attorney fees in the amount of \$1,000 if this matter is not contested.

Attorney fees are being sought pursuant to the terms of the contract between the parties.

3. For all costs incurred by Plaintiff in this action.
4. For such other and further relief as the court deems just and proper.

DATED this 4th day of January, 2014.

COSHO HUMPHREY, LLP

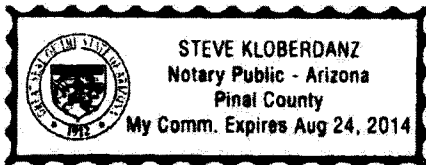

STANLEY W. WELSH
Attorneys for Plaintiff

STATE OF IDAHO)
) ss.
County of Ada)

That she is the Plaintiff in the above entitled action. That she has read the within and foregoing Complaint; knows the contents thereof; and that the facts therein stated are true as she verily believes.

Linda C. Kesting
Linda C. Kesting

SUBSCRIBED AND SWORN To before me this 4th day of January, 2014.



[Signature]
NOTARY PUBLIC For Idaho ARIZONA
Residing at Boise, Idaho CASA GRANDE, ARIZONA
My Commission Expires: 8/24/2014

NO. _____ FILED _____
A.M. _____ P.M. 2:03

JAN 24 2014

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

James A. Kesting
2508 N Elk Cove Way
Meridian, ID 83646
Telephone (208) 559-4244

Defendant

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,
Plaintiff,
vs.

JAMES A. KESTING,
Defendant.

Case No. CV 0C 1400258

ANSWER

Fee Category: _____

Filing Fee: \$ _____

The above named Defendant for his Answer to the allegations in the case on file herein, states:

1. I completely agree with and admit the following paragraphs:

Paragraph I

Paragraph II

Paragraph III

CIVIL CASE ANSWER

CAO CvPi 3-2 3/10/2011

PAGE 1

000011

2. I admit the portion of paragraph IV that states: "Pursuant to the terms of the contract, Defendant is obligated to pay the attorney fees and costs incurred by plaintiff in this action.
3. I deny the portion of paragraph IV that states: "If this matter is not contested, Defendant should be ordered to pay to Plaintiff attorney fees in the amount of \$1000." because I do not have enough information to admit or deny it.

I swear I have read this Answer and state that all facts included are true.

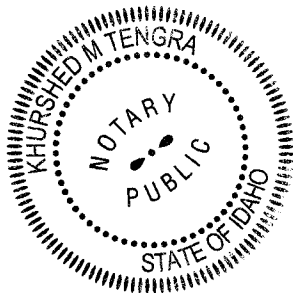
I ask the Court to enter any order requested above.

Date: 1/23/14

James L. Ketter
Signature of Defendant

SUBSCRIBED AND SWORN to before me this

23rd day of January, 2014



Casper
Notary Public for Idaho

Residing at BOISE, ID

My Commission expires 03/26/2019

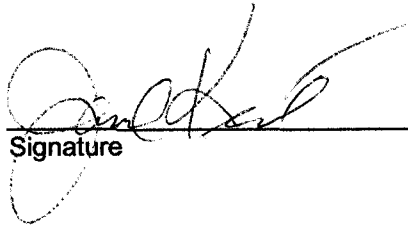
CERTIFICATE OF SERVICE

I certify that on 23rd day of January, 2014 I served a copy to:

Stanley W. Welsh
Coshu Humphrey, LLP
800 Park Blvd., STE 790
Boise, ID 83712

☒ By mail
☐ By fax (number) _____
☐ By personal delivery

James A. Kesting



Signature

RECEIVED
FEB 19 2014
Ada County Clerk

NO. _____ FILED _____
A.M. _____ P.M. _____

FEB 28 2014
CHRISTOPHER D. RICH, Clerk
By LYNDIA MacKINNON
DEPUTY

STANLEY W. WELSH ISB #1964
MATT SCHELSTRATE ISB #8276
COSHO HUMPHREY, LLP
Counselors and Attorneys at Law
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO Box 9518
Boise, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff,

v.

JAMES A. KESTING,

Defendant.

Case No. CV OC 1400258

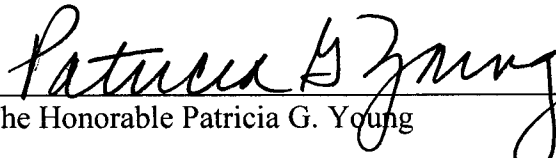
**ORDER GRANTING MOTION FOR
JUDGMENT ON THE PLEADINGS**

The above-captioned matter came before this court on February 18, 2014. Plaintiff appeared through her attorney, Matt Schelstrate. Defendant appeared in person.

BASED UPON the hearing of this matter, the evidence submitted, and good cause appearing therefore, it is HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for Judgment on the Pleadings is granted.
2. Plaintiff is directed to submit a Memorandum of Costs and Attorney's Fees for the Court's consideration.

DATED This 26 day of February, 2014.



The Honorable Patricia G. Young

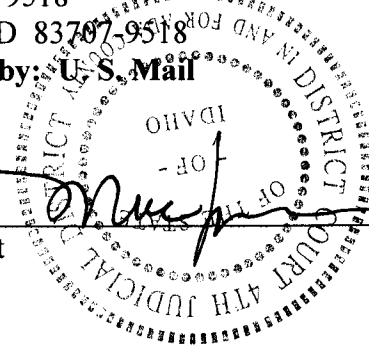
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 28 day of February, 2014, a true and correct copy of the within and foregoing instrument was served upon:

James "Jay" A. Kesting
2508 N. Elk Cove Way
Meridian, Idaho 83646
Served by: U. S. Mail

Stanley W. Welsh
Cosho Humphrey, LLP
PO Box 9518
Boise, ID 83707-9518
Served by: U. S. Mail


Clerk of the Court



PD
10ERT

STANLEY W. WELSH ISB #1964
MATT SCHELSTRATE ISB #8276
COSHO HUMPHREY, LLP
Counselors and Attorneys at Law
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO Box 9518
Boise, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

NO. 10 FILED PM
A.M.
FEB 28 2014
CHRISTOPHER D. RICH, Clerk
By LYNDA MacKINNON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff,

v.

JAMES A. KESTING,

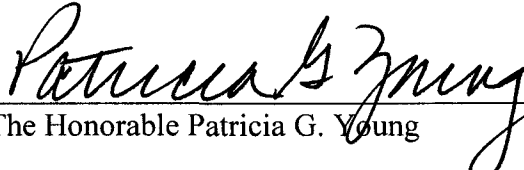
Defendant.

Case No. CV OC 1400258

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Judgment is hereby entered in favor of Plaintiff against Defendant in the amount of \$8,000.00, together with post-judgment interest allowed by law from the date of this Judgment.

DATED This 26 day of February, 2014.

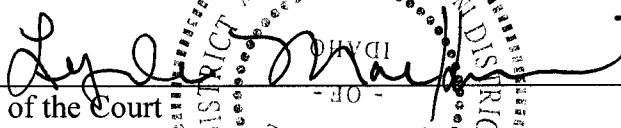

The Honorable Patricia G. Young

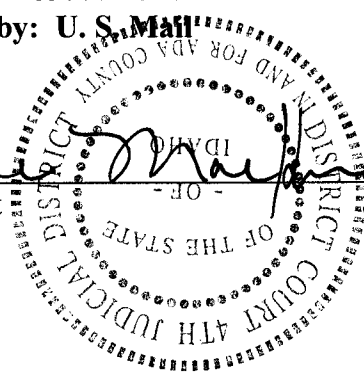
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 28 day of February, 2014, a true and correct copy of the within and foregoing instrument was served upon:

James "Jay" A. Kesting
2508 N. Elk Cove Way
Meridian, Idaho 83646
Served by: U. S. Mail

Matt Schelstrate
Stanley W. Welsh
Cosho Humphrey, LLP
PO Box 9518
Boise, ID 83707-9518
Served by: U. S. Mail


Clerk of the Court



RECEIVED

MAR 11 2014

ADA COUNTY

NO. _____ FILED P.M. 230
A.M. _____

MAR 27 2014

CHRISTOPHER D. RICH, Clerk
By MIKE TOMPKINS
DEPUTY

STANLEY W. WELSH ISB #1964
MATT SCHELSTRATE ISB #8276
COSH O HUMPHREY, LLP
Counselors and Attorneys at Law
800 PARK BLVD., STE. 790
BOISE, ID 83712
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff,

v.

JAMES A. KESTING,

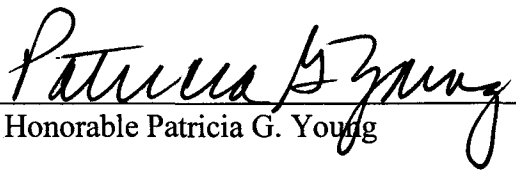
Defendant.

Case No. CV OC 1400258

JUDGMENT

IT IS HEREBY ORDERED AND ADJUGED that a Judgment be entered in favor of Plaintiff, Linda C. Kesting, against Defendant, James A. Kesting, in the amount of \$1,227.80, together with post-judgment interest allowed by law from the date of this Judgment.

DATED This 18 day of March, 2014.


The Honorable Patricia G. Young

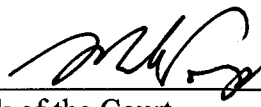
CERTIFICATE OF SERVICE

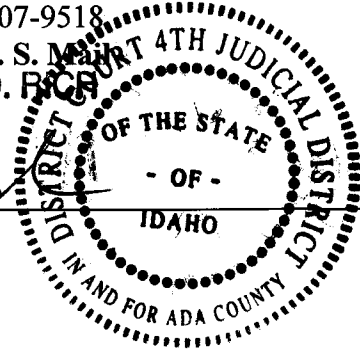
I HEREBY CERTIFY That on the 27 day of March, 2014, a true and correct copy of the within and foregoing instrument was served upon:

James "Jay" A. Kesting
2508 N. Elk Cove Way
Meridian, Idaho 83646
Served by: U. S. Mail

Matt Schelstrate
Stanley W. Welsh
Cosho Humphrey, LLP
PO Box 9518
Boise, ID 83707-9518

Served by: U. S. Mail
CHRISTOPHER D. RICE


Clerk of the Court



JUN 25 2014

CHRISTOPHER D. RICH, Clerk
By DEIRDRE PRICE
DEPUTY

STANLEY W. WELSH ISB #1964
MATT SCHELSTRATE ISB #8276
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff,

v.

JAMES A. KESTING,

Defendant.

Case No. CV OC 1400258

**JUDGMENT OF QUALIFIED
DOMESTIC RELATIONS ORDER**

This Order is intended to be a qualified domestic relations order ("QDRO"), as that term is defined in § 206(d) of the Employee Retirement Income Security Act of 1974 ("ERISA") and § 414(p) of the Internal Revenue Code of 1986 ("Code"). This QDRO is granted in accordance with applicable state domestic relations laws which relate to marital property rights, child support, and/or spousal support between spouses and former spouses in matrimonial actions. The purpose of this Qualified Domestic Relations Order is to satisfy pending judgments for alimony owed by the Participant to the Alternate Payee.

SECTION 1. IDENTIFICATION OF PLAN

This Order applies to benefits under the J.P. Morgan **Terteling Employees Profit Sharing and Thrift Savings Plan** ("Plan").

SECTION 2. IDENTIFICATION OF PARTICIPANT AND ALTERNATE PAYEE

a. The "Participant" is James A. Kesting. The Participant's last known mailing address is 2508 N. Elk Cove Way, Meridian, Idaho 83646. The Participant's social security number and date of birth are included on the separate addendum and not incorporated as part of this order.

b. The "Alternate Payee" is Linda C. Kesting. The Alternate Payee's last known mailing address is 1827 E. Angelica Drive, Casa Grande, Arizona 84122. The Alternate Payee's social security number and date of birth are included on the separate addendum and not incorporated as part of this order. The Alternate Payee is the former spouse of the Participant.

SECTION 3. AMOUNT OF BENEFIT TO BE PAID TO ALTERNATE PAYEE

The Alternate Payee and the Participant were divorced by this Court on July 31, 2009. Incident to the Judgment and Decree of Divorce, the parties entered into a contract for the payment of alimony. Because of the breach of the Participant and failure to pay as required, the Plaintiff/Alternate Payee was granted a Judgment dated February 28, 2014 in the amount of \$8,000, including interest at the statutory rate of 5.250% or \$1.15 per day until paid. Interest accrued on the February 28, 2014 judgment is \$103.50 as of May 29, 2014. The total amount due on the February 28, 2014 judgment as of May 29, 2014 is \$8,103.50. Plaintiff/Alternate

Payee was also granted a Judgment for fees incurred seeking to collect unpaid alimony against the Participant on March 27, 2014 for \$1,277.80, including interest at the rate of 5.250% for a total of \$.18 per day. Interest accrued on the March 27, 2014 Judgment is \$11.34 as of May 29, 2014. The total amount due on the March 27, 2014 Judgment as of May 29, 2014 is \$1,239.14. The total amount due on both of these outstanding judgments as of May 29, 2014 is \$9,342.64.

Therefore, the Alternate Payee is hereby assigned an interest in and entitled to receive the amount of \$9,342.64 of the Participant's vested account balance as of May 29, 2014. The Alternate Payee's interest shall be satisfied by a lump sum payment of the amount awarded or by transferring pro rata by fund and source (excluding the Participant's loan fund, if any) such interest to a separate account under the Plan on behalf of the Alternate Payee, which is allowed under the Plan

The Alternate Payee is also entitled to earnings, gains and losses on the specified amount from the valuation date of May 29, 2014, until such amount is transferred into an account for the Alternate Payee. Earnings, gains and losses for the period of time from the account separation date in the QDRO to the date of actual segregation of funds between Participant and Alternate Payee will be calculated by prorating dividends and unrealized gains and losses.

If the Participant's account balance in the Plan includes an outstanding loan balance, the loan will remain an asset of the Participant's accounts. The amount of such outstanding loan balance will not be included in the Participant's total account balance for purposes of determining the Alternate Payee's interest.

SECTION 4. FORM AND COMMENCEMENT OF PAYMENT

The Alternate Payee may elect to receive payment from the Plan of benefits assigned to the Alternate Payee under this Order in any form in which such benefits may be paid under the Plan to the Participant, other than in the form of a qualified joint and survivor annuity with

respect to the Alternate Payee and his or her subsequent spouse, if any, but only if the form elected complies with the minimum distribution requirements of § 401(a)(9) of the Code.

Payments to the Alternate Payee pursuant to this Order shall be in accordance with the Plan terms and commence as soon as practicable after this Order has been determined to be a qualified domestic relations order, and upon receipt of the Alternate Payee's properly completed benefit election form.

SECTION 5. DEATH OF PARTICIPANT

Any amounts assigned to the Alternate Payee under this Order shall not be affected by the Participant's death.

SECTION 6. DEATH OF ALTERNATE PAYEE

If the Alternate Payee dies prior to receiving her share of the Participant's account balance assigned to such Alternate Payee under the terms of this Order, the Alternate Payee's share shall be made to a beneficiary designated by the Alternate Payee on a form approved by the Plan. In the absence of a designated beneficiary, the Alternate Payee's share shall be paid based on the terms of the Plan.

SECTION 7. INVESTMENT DIRECTION, LOANS AND HARDSHIP DISTRIBUTIONS

To the extent permitted by the Plan, the Alternate Payee shall be permitted to direct investment of her separate interest to the same extent as the Participant is entitled to direct the investment of his account balances. To the extent not inconsistent with the terms of the Plan, the Alternate Payee shall not be eligible for hardship distributions or loans.

SECTION 8. CONSTRUCTIVE RECEIPT

In the event that the plan trustee inadvertently pays to the Participant any benefits that are assigned to the Alternate Payee pursuant to the terms of this Order, the Participant shall immediately reimburse the Alternate Payee to the extent that he has received such benefit payments, and shall forthwith pay such amounts so received directly to the Alternate Payee within ten (10) days of receipt.

In the event the plan trustee inadvertently pays to the Alternate Payee any benefits that were assigned to the Participant pursuant to the terms of this Order, the Alternate Payee shall reimburse the Plan, to the extent that he/she has received such overpayment, within ten (10) days of receipt of such notice of overpayment.

SECTION 9. COMPLIANCE WITH APPLICABLE LAWS

The parties to this order intend that it comply with applicable provisions of ERISA and the Code. Nothing in this Order shall require the Plan:

- a. To provide any type or form of benefit, or any option, not otherwise provided under the Plan;
- b. To provide increased benefits (determined on the basis of actuarial value); and
- c. To pay benefits to any Alternate Payee that are required to be paid to another Alternate Payee under another Order previously determined to be a qualified domestic relations order.

SECTION 10. TAX TREATMENT OF BENEFITS TO ALTERNATE PAYEE

Any benefit payment to the Alternate Payee pursuant to this QDRO shall be taxable to the Alternate Payee as provided in Sections 72 and 402 of the Code, and shall not be taxable to the Participant. Determination and allocation of the Participant's investment in the Plan, if any, shall be made in accordance with the provisions of Section 72(m)(10) of the Code.

SECTION 11. RESERVATION OF JURISDICTION

The Court reserves jurisdiction over the parties and the subject matter to amend this Order to establish and maintain its status as a QDRO under ERISA and the Code.

IT IS SO ORDERED:

Date: June 25, 2014

Patricia G. Young
The Honorable Patricia G. Young

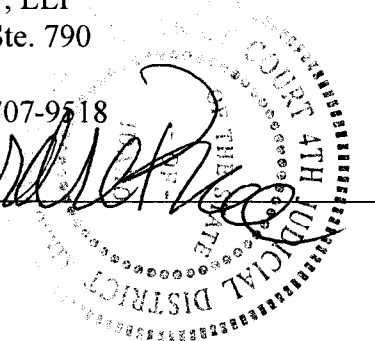
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of ~~May~~, 2014, a true and correct copy of the within and foregoing instrument was served upon:

James "Jay" A. Kesting
2508 N. Elk Cove Way
Meridian, Idaho 83646

Stanley W. Welsh
Matt Schelstrate
Cosho Humphrey, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
(Boise, Idaho 83707-9518)

[Signature]
CLERK



JUL 11 2014

NO.

A.M.

FILED
P.M.

4

JUL 10 2014

CHRISTOPHER D. RICH, Clerk
By PATRICK McLAUGHLIN
DEPUTY

C. Tom Arkoosh, ISB No. 2253
 Nikeela R. Black, ISB No. 8834
 ARKOOSH LAW OFFICES
 802 West Bannock, Suite 900
 P.O. Box 2900
 Boise, Idaho 83701-2900
 Telephone: (208) 343-5105
 Facsimile: (208) 343-5456

RECEIVED IN TRANSCRIPTS

7/14/14 - PR

Attorneys for Respondent

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff/Respondent,

vs.

JAMES A. KESTING,

Defendant/Appellant.

Case No. CV OC 1400258

NOTICE OF APPEAL

TO: Petitioner, Linda Kesting, and her attorneys of record Stanley Welsh and Matt Schelstrate.

NOTICE IS HEREBY GIVEN THAT:

1. James Kesting appeals against the above named Petitioner to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, from the Magistrate Division of the Fourth Judicial District of the State of Idaho, in and for the

NOTICE OF APPEAL - 1

000026

County of Ada, the Honorable Patricia G. Young presiding.

2. This Appeal is taken from the Judgment of Qualified Domestic Relations Order filed on June 25, 2014, confirming Judgment, dated March 27, 2014.
3. This Appeal is taken upon matters of law.
4. A hard copy of the standard transcript of the June 25, 2014 hearing is requested and will be provided to the Court to reference.
5. Issues on Appeal:
 - a. Whether Judge Young erred as a matter of law by ordering the division of an otherwise exempt retirement account via a Qualified Domestic Relations Order to satisfy a money judgment awarded for breach of a civil contract, in violation of 29 U.S.C. §1056(d)(1) and Idaho Code §11-604A.

DATED this 10th day of June, 2014.

ARKOOSH LAW OFFICES



Nikeela R. Black
Attorneys for Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 10th day of June, 2014, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Stanley Welsh
Matt Schelstrate
COSHO HUMPHREY
P.O. Box 9518
Boise, ID 83707-9518

<input type="checkbox"/>	U.S. Mail, Postage Prepaid
<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Hand Delivered
<input checked="" type="checkbox"/>	Via Facsimile
<input type="checkbox"/>	CM/ECF Notice of Electronic Filing



Nikeela R. Black

RECEIVED

JUN 19 2014

ADA COUNTY CLERK

STANLEY W. WELSH ISB #1964
MATT SCHELSTRATE ISB #8276
COSHO HUMPHREY, LLP
Counselors and Attorneys at Law
800 PARK BLVD., STE. 790
BOISE, ID 83712
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff,

v.

JAMES A. KESTING,

Defendant.

Case No. CV OC 1400258

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Against Defendant James A. Kesting and in favor of Plaintiff Linda C. Kesting in the amount of **\$1,859.50**, together with post-judgment interest allowed by law.

DATED This 19 day of August, 2014.


The Honorable Patricia G. Young

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 27th August day of ~~June~~ 2014, a true and correct copy of the within and foregoing instrument was served upon:

C. Thomas Arkoosh
Arkoosh Law Offices
P.O. Box 2900
Boise, Idaho 83701
Served by: U.S. Mail

Matt Schelstrate
Stanley W. Welsh
Cosho Humphrey, LLP
PO Box 9518
Boise, ID 83707-9518
Served by: U. S. Mail



Clerk of the Court

PD
10/1/14

NO. _____ FILED _____
A.M. _____ P.M. 3

AUG 28 2014

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

STANLEY W. WELSH ISB #1964
MATT SCHELSTRATE ISB #8276
COSHO HUMPHREY, LLP
Counselors and Attorneys at Law
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO Box 9518
Boise, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Petitioner,

v.

JAMES A. KESTING,

Respondent.

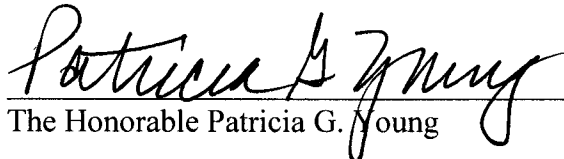
Case No. CV OC 1400258

JUDGMENT FOR ATTORNEY FEES

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiff Linda C. Kesting shall recover attorney fees from Defendant James A. Kesting in the amount of \$2,498. Post-judgment interest shall accrue on this amount from the date of this Judgment until satisfied.

DATED This 27 day of August, 2014.


The Honorable Patricia G. Young

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 28 day of August, 2014, a true and correct copy of the within and foregoing instrument was served upon:

Nikeela Black
Arkoosh Law Offices
VIA FAX: 343-5456
P.O. Box 2900
Boise, Idaho 83701
Served by: U.S. Mail

Stanley W. Welsh
Matt Schelstrate
Cosho Humphrey, LLP
PO Box 9518
Boise, ID 83707-9518
Served by: U.S. Mail

CHRISTOPHER D. RICH

Jenna Cad
Clerk of the Court

AUG 28 2014

CHRISTOPHER D. RICH, Clerk
By PATRICK McLAUGHLIN
DEPUTY

**IN THE DISTRICT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA**

LINDA C. KESTING,

Appellee,

vs.

JAMES A. KESTING,

Appellant,

Case No. CV OC 1400258

APPELLANT'S BRIEF

**On appeal from the District Court of the Fourth Judicial District of the
State of Idaho, in and for the County of Ada, Magistrate Division
The Honorable Patricia Young, Presiding**

Stanley W. Welsh, ISB #1964
Matt Schelstrate, ISB #8276
COSHO HUMPHREY, LLP
800 Park Blvd. Suite 790
P.O. Box 9518
Boise, ID 83707-9518
Attorneys for Appellee Linda Kesting

C. Tom Arkoosh, ISB #2253
Nikeela R. Black, ISB #8834
ARKOOSH LAW OFFICES, PLLC
802 W. Bannock Street, Suite 900
P. O. Box 2900
Boise, ID 83701
Attorneys for Appellant James Kesting

TR.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES	ii
I. STATEMENT OF THE CASE	1
A. Nature of the Case.....	1
B. Factual Background and Procedural History	1
II. ISSUES PRESENTED ON APPEAL	2
III. STANDARD OF REVIEW	2
IV. ARGUMENT.....	3
A. James and Linda Kesting Entered into a Separate Civil Contract Which is not a Spousal Support Order	3
B. A Money Judgment Creditor is not Entitled to a Qualified Domestic Relations Order to Access Qualified Accounts Protected Under ERISA.....	5
C. Appellant is Entitled to Attorney's Fees on Appeal.....	10
V. CONCLUSION.....	11
CERTIFICATE OF MAILING.....	12

TABLE OF CASES AND AUTHORITIES

CASES

<i>Ameritrust Company, N.A. v. Derakhshan</i> , 830 F.Supp. 406 (N.D. Ohio 1993).....	7
<i>Bainbridge v. Bainbridge</i> , 75 Idaho 13, 23-24, 265 P.2d 662, 669 (1954)	3
<i>Barnedt v. Wilder</i> , 137 Idaho 415, 418, 49 P.3d 1265, 1268 (Ct.App.2002)	3
<i>Borley v. Smith</i> , 149 Idaho 171, 177, 233 P.3d 102, 108 (2010).....	4,5
<i>Callaghan v. Callaghan</i> , 142 Idaho 185, 191, 125 P.3d 1061, 1067 (2005).....	10
<i>Clements Farms, Inc. v. Ben Fish & Son</i> , 120 Idaho 185, 814 P.2d 917 (1991).....	2
<i>Crowley v. Critchfeld</i> , 145 Idaho 509, 181 P.3d 435 (2007)	10
<i>DeSantis v. DeSantis</i> , 714 So.2d 637, 638 (Fla.Dist.Ct.App.1998)	9
<i>Hentges v. Hentges</i> , 115 Idaho 192, 194 (Ct. App. 1988)	2
<i>Hoy v. Hoy</i> , 29 Va.App. 115, 510 S.E.2d 253 (1999).....	10
<i>Keeler v. Keeler</i> , 131 Idaho 442, 444-45, 958 P.2d 599,601-02 (Ct.App.1998)	3,4
<i>Kimball v. Kimball</i> , 83 Idaho 12, 16, 356 P.2d 919, 922 (1960)	3
<i>Mackey v. Lanier Collection Agency</i> , 486 U.S. 825, 833-34, 108 S. Ct. 2182, 100 L.Ed.2d 836 (1988)	8
<i>Phillips v. Phillips</i> , 93 Idaho 384, 386, 462 P.2d 49, 51 (1969).....	3,4,5
<i>Roesbery v. Roesbery</i> , 88 Idaho 514, 521, 401 P.2d 805, 809 (1965)	3,4
<i>Spencer-Steed v. Spencer</i> , 115 Idaho 338,344, 766 P.2d 1219,1225 (1988).....	3
<i>State v. Kenner</i> , 121 Idaho 594, 826 P.2d 1306,1308 (1992).....	2
<i>Terteling v. Payne</i> , 131 Idaho 389,393-94, 957 P.2d 1387,1391-92 (1998)	3

CODES/RULES/STATUTES

Idaho Appellate Rule 41	10
Idaho Code § 7-1015.....	4
Idaho Code § 11-604A.....	8
Idaho Code § 11-607.....	8
Idaho Code § 12-117.....	2
Idaho Code § 12-121.....	10
Idaho Code § 12-123.....	2
Idaho Code § 32-705.....	7
Idaho Rules of Civil Procedure 83(u)(1)	2
Internal Revenue Code § 401(a)	7
Internal Revenue Code § 401(a)(13)(A).....	6,7
Internal Revenue Code § 414(p).....	6,7

I.

STATEMENT OF THE CASE

A. Nature of the Case

James Kesting (hereinafter, "James") brings this appeal of the Magistrate Court's award of a Qualified Domestic Relations Order on June 25, 2014. Specifically, Judge Young erred as a matter of law in granting Linda Kesting's (hereinafter, "Linda") *Motion for Entry of Qualified Domestic Relations Order* because (1) the contract between James and Linda Kesting is a civil contract, not a Spousal Support Order, and (2) Idaho State law does not allow money judgment creditors to execute collection of judgments from exempt retirement accounts. Accordingly, James respectfully requests that this Court vacate the *Qualified Domestic Relations Order*.

B. Factual Background and Procedural History

James and Linda Kesting were married for thirty years. They divorced in 2009. In the divorce, the parties agreed that James would be awarded his 401(k) account and that Linda would be awarded the marital residence, each party would take their respective bank accounts, and they would remain joint owners of the timeshare condo in Hawaii. The parties also entered into a separate settlement contract, which was not attached to the Decree. The contract expressly stated that James would make monthly payments to Linda of \$1,600. In the fall of 2013, James lost his job and fell behind on those payments.

On or about January 7, 2014, Linda filed a collection action to collect the unpaid monthly payments. Linda was represented by her current counsel of record. James did not retain counsel, and submitted an *Answer to the Complaint, pro se* on January 24, 2014. A *Judgment* for \$8,000.00 was entered against James on February 28, 2014. A *Writ of Execution* was issued on April 3, 2014. The writ was returned unexecuted on April 28, 2014. Linda filed a *Motion for Entry of Qualified*

Domestic Relations Order on May 29, 2014. A Debtor's Examination of James was conducted on June 24, 2014. An order granting the *Motion for Entry of Qualified Domestic Relations Order* was entered on June 25, 2014. James filed a *Motion for Stay of Judgment Pending Appeal* to stay the execution of the Qualified Domestic Relations Order, which was granted on August 13, 2014.

II.

ISSUES PRESENTED ON APPEAL

1. Whether Judge Young erred as a matter of law by treating James and Linda Kesting's separate civil contract as a Spousal Support Order;
2. Whether Judge Young erred as a matter of law by granting a Qualified Domestic Relations Order to a money judgment creditor in violation of state and federal law; and,
3. Whether Appellant is entitled to attorney costs and fees under Idaho Code §§ 12-117 and 12-123.

III.

STANDARD OF REVIEW

When a District Judge considers an appeal from a Magistrate Judge, the District Judge is acting as an Appellate Court, not as a Trial Court. *State v. Kenner*, 121 Idaho 594, 826 P.2d 1306, 1308 (1992); I.R.C.P. 83(u)(1). Accordingly, the standards of review are the same as those applied by the Idaho Supreme Court or Court of Appeal in a regular appeal: the District Court upholds the lower court's factual findings if based on substantial and competent, though conflicting, evidence; and affirms conclusions of law which demonstrate proper application of legal principles to the facts found. *Hentges v. Hentges*, 115 Idaho 192, 194 (Ct. App. 1988). Where issues on appeal involve questions of law, a reviewing court exercises free review. *Clements Farms, Inc. v. Ben Fish & Son*, 120 Idaho 185, 814 P.2d 917 (1991).

IV.

ARGUMENT

A. James and Linda Kesting Entered into a Separate Civil Contract Which is Not a Spousal Support Order.

In July 2009, James and Linda drafted and signed a contract in which James agreed to make monthly payments to Linda for life. It was a separate contract; in paragraph two it expressly stated “This shall remain a separate contract and does not constitute a court order.” [Emphasis added]. The fact that the contract was titled Alimony/Spousal Support Agreement is irrelevant, it is not a valid support order because it was never reviewed, approved, entered by a court, and the parties expressly stated in the contract that it was not a court order.

When a spousal support obligation arises only from a settlement agreement, the right to enforce the spousal support obligation rests on the contract. *Terteling v. Payne*, 131 Idaho 389, 393–94, 957 P.2d 1387, 1391–92 (1998); *Spencer–Steed v. Spencer*, 115 Idaho 338, 344, 766 P.2d 1219, 1225 (1988); *Roesbery v. Roesbery*, 88 Idaho 514, 521, 401 P.2d 805, 809 (1965); *Kimball v. Kimball*, 83 Idaho 12, 16, 356 P.2d 919, 922 (1960); *Bainbridge v. Bainbridge*, 75 Idaho 13, 23–24, 265 P.2d 662, 669 (1954); *Keeler v. Keeler*, 131 Idaho 442, 444–45, 958 P.2d 599, 601–02 (Ct.App.1998). However, when a settlement agreement is incorporated, or “merged,” into a divorce decree, the agreement becomes enforceable only as part of the decree, and not as a separate contract. *Phillips v. Phillips*, 93 Idaho 384, 386, 462 P.2d 49, 51 (1969); *Kimball*, 83 Idaho at 16, 356 P.2d at 922; *Barnedt v. Wilder*, 137 Idaho 415, 418, 49 P.3d 1265, 1268 (Ct.App.2002). As stated in *Kimball*, 83 Idaho at 15, 356 P.2d at 921, “Merger is the substitution of rights and duties under the judgment or the decree for those under the agreement or cause of action sued upon.” In other words, when an agreement is merged into a divorce decree, it becomes part of the final order of the court.

The right to enforce the separate contract through an action for breach of contract is supplanted by the divorce court's authority to enforce its orders, property division, child support, and spousal maintenance. If a settlement agreement has been merged, the spousal support provisions generally may be judicially modified by the court of original jurisdiction. I.C. § 7–1015; *Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010); *Keeler*, 131 Idaho at 444–45, 958 P.2d at 601–02.

In the past, courts looked at the intent of the parties and the court at the time of the divorce to determine whether an agreement between the parties was merged into a divorce decree. *E.g.*, *Roesbery*, 88 Idaho at 518, 401 P.2d at 807. Under the intent test, the actual incorporation of the terms of the agreement into a divorce decree or physical attachment of the agreement usually, but not always, resulted in a finding that the agreement was merged, while language in a decree indicating an “ ‘approval,’ ‘ratification,’ or ‘confirmation’ of the agreement by the court [was held] not sufficient to denote merger.” *Phillips*, 93 Idaho at 387, 462 P.2d at 52. That approach of determining whether an agreement was incorporated by looking, first and foremost, at the intent of the parties was abandoned in *Phillips*. There, the Court reasoned that the difficulty of “ascribing such an intent to laymen” forced courts to “indulge in technical hair splitting.” *Id.* at 386, 462 P.2d at 51. The Court recognized that application of the test produced inconsistent results, and therefore the Court in *Phillips* announced a new rule as follows:

[W]hen parties enter into an agreement of separation in contemplation of divorce and thereafter the agreement is presented to a district court in which a divorce action is pending and the court is requested to approve, ratify or confirm the agreement, certain presumptions arise. In the absence of clear and convincing evidence to the contrary, it will be presumed that ... the agreement is merged into the decree of divorce, [and] is enforceable as a part thereof....

Id. at 387, 462 P.2d at 52. *See also*, *Keeler*, 131 Idaho at 445, 958 P.2d at 602.

More recently, our Supreme Court explained that under the *Phillips* rule:

The proper analysis is to look first *only* to the four corners of the divorce decree. If the language of the decree clearly and unambiguously holds the property settlement agreement is not merged, the inquiry is at an end. The court's inquiry will move beyond the four corners of the decree to the property settlement agreement only when the decree is ambiguous and reasonably susceptible to conflicting interpretations.

Borley, 149 Idaho at 177, 233 P.3d at 108.

Thus, according to the standard articulated in *Phillips* and *Borley*, when the divorce decree is unambiguous, the intent of the parties is not a material issue to the determination of whether an agreement was merged.

Here, the Kesting's divorce decree unambiguously states that spousal support is "governed by a separate contract between the parties which is not part of this Decree and is not modifiable by this court." The parties in this case expressly stated their desire that the contract not be merged, incorporated, or otherwise connected with the Decree of Divorce. Additionally, as mentioned above, the separate contract also includes a provision stating that it is a separate contract and not a court order. There is no evidence it was ever presented to the court for judicial approval or entry, or that it was ever the desire of the parties to have a spousal support order entered by the court. Therefore, regardless of the title of the document, it is not a court order. It was not attached to the *Decree of Divorce*, nor was it ever approved or entered by a court. Spousal support orders are issued by a court, and generally modifiable by that court. In this case the parties expressly stated that the court would not have jurisdiction over the contract; it is nothing more than a standard payment contract between the parties, and as such, subject to traditional contract law.

B. A Money Judgment Creditor is Not Entitled to a Qualified Domestic Relations Order to Access Qualified Accounts Protected Under ERISA.

In January 2014, Linda filed an action to collect based on the contract between the parties, not as an action to enforce a court ordered support order. A money judgment was issued based on

breach of contract by James' failure to make the monthly payments. Consistent with a money judgment, a writ of execution was issued. It was returned unexecuted, however, due to James' lack of assets. Linda then motioned the court to enter a Qualified Domestic Relations Order which would allow her access to James' only asset, his 401(k) account, a qualified retirement plan, which is generally exempt from collection actions.

Commencing in the 1970s, a trend in the law began to develop towards recognizing benefits from retirement plans, including pension and profit sharing plans, collectively "retirement plans," as marital assets and as community property in community property states subject to distribution in dissolution of marriage cases. The principle espoused in the majority of cases was that retirement rights are a form of deferred compensation received in lieu of higher compensation which would otherwise have been received by the parties during the marriage.

The Employee Retirement Income Security Act of 1974 (ERISA), governs qualified retirement plans. ERISA sets standards for such plans with respect to participation, vesting, benefit accrual, and funding. ERISA, however, also provides that qualified retirement plan benefits cannot be alienated or assigned, and that ERISA provisions preempt all other state law. I.R.C. §401(a)(13)(A). Hence, a state court's attempt to distribute funds in retirement plans conflict with the provisions of ERISA.

The Retirement Equity Act of 1984 (REA) was enacted to resolve the growing conflict between ERISA and state law allowing for distribution of retirement rights in qualified plans upon dissolution of marriage. REA added I.R.C. §414(p) to the Internal Revenue Code. I.R.C. §414(p)

permits the creation, assignment and recognition of any right in certain eligible retirement plans of a participant only through a Qualified Domestic Relations Order.¹

To be a “qualified plan” under REA, a plan must be an employee retirement plan which complies with the requirements of ERISA and the Internal Revenue Code so as to allow tax deferral to employees of monies set aside for their retirement. *See* I.R.C. §401(a).

Internal Revenue Code §414(p) defines “domestic relations order” as:

...any judgment, decree, or order (including approval of a property settlement agreement) which-

- (i) relates to the provision of child support, alimony payments, or martial property rights to a spouse, former spouse, child, or other dependent of a participant, and
- (ii) is made pursuant to a State domestic relations law...

Internal Revenue Code §414(p). [Emphasis added.]

In order to qualify as a Domestic Relations Order, it must relate to a valid support order made pursuant to state domestic relations law. In Idaho, the state law governing support orders is Idaho Code §32-705 which states in pertinent part that:

- 1. Where a divorce is decreed, the court may grant a maintenance order if it finds that the spouse seeking maintenance:
 - a. Lacks sufficient property to provide for his or her reasonable needs; and
 - b. Is unable to support himself or herself through employment.

I.C. §32-705.

Several courts have considered when QDROs are allowed to be granted after divorce decree. In each of the states where a party has been able to obtain a QDRO after the date of divorce, there have been two things present:

¹ Although it is stated above “only through a QDRO,” the court in *Ameritrust Company, N.A. v. Derakhshan*, 830 F.Supp. 406 (N.D. Ohio 1993), held that tax levies by the United States were valid against the participant’s qualified plan notwithstanding the anti-alienation provisions of ERISA. In *Ameritrust*, the Wife had a QDRO from a state court which assigned the Husband’s plan to her. However, the tax liens took precedence because they have priority in time.

1. A valid order from the magistrate court for child or spousal support, either by judicial order or by judicially approved settlement agreement, and

2. State law providing a support order exception allowing retirement accounts to be accessed to satisfy support judgments.

Since ERISA does not provide an enforcement mechanism for collecting judgments, state law methods for collecting money generally remain undisturbed by ERISA; otherwise there would be no way to enforce a judgment won against an ERISA plan. *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 833-34, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988).

State law in Idaho does not allow money judgment creditors to access retirement accounts.

Idaho Code § 11-604A governs pension money exemptions. I.C. § 11-604A(3) states:

The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of Idaho under any employee benefit plan, and any fund created by the benefit plan or arrangement, shall be exempt from execution, attachment, garnishment, seizure, or other levy by or under any legal process whatever. This subsection shall not apply to any child support collection actions, if otherwise permitted by federal law. This subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in the plan to the extent expressly provided for in a qualified domestic relations order that meets the requirements for those orders under the plan, or, in the case of benefits payable under a plan described in sections 403(b), 408, 408A or 457 of the Internal Revenue Code of 1986, as amended, or section 409 of the Internal Revenue Code as in effect before January 1, 1984, to the extent provided in any order issued by a court of competent jurisdiction that provides for maintenance or support. This subsection shall not prohibit actions against an employee benefit plan or fund for valid obligations incurred by the plan or fund for the benefit of the plan or fund.

I.C. § 11-604A.² [Emphasis added.]

² In a brief filed by Linda she argues that I.C. § 11-607 is the appropriate statute. However, I.C. § 11-607 is irrelevant because it only governs claims against exempt property "notwithstanding other provisions of this act" I.C. § 11-604A was not part of the same act, and therefore not affected by I.C. § 11-607.

While the statute does allow for the use of a QDRO along the same lines as the federal law, it also follows the federal law by expressly stating, “to the extent provided in any order issued by a court of competent jurisdiction that provides for maintenance or support.” *Id.* [Emphasis added.]

Clearly, both federal and state law require that prior to separating qualified retirement funds in order to pay a Judgment, the Judgment itself must be to collect support payments generated from a valid child or spousal support order. In this case, the separate contract between the parties was not approved, merged, or otherwise ordered by the court, it is not a spousal support order. Throughout the collection action Linda has sought to treat the contract as either a separate civil contract or a spousal support order depending on what is more favorable to her position. Spousal support orders are generally modifiable by the court that issued them. Linda wants the best of both worlds; she does not want the court to be able to review and modify the contract relating to her monthly payments, as it would be able to do if it was a spousal support order, yet she wants the court to treat it like a spousal support order when requesting a QDRO to collect on the contract.

Granting a QDRO allowing Linda to attach her money judgment to funds within James’ 401(k) account effectually alters the original divorce decree, which is not permitted in Idaho. In *DeSantis v. DeSantis*, 714 So.2d 637, 638 (Fla.Dist.Ct.App.1998), the court determined a QDRO had been improperly entered where the dissolution judgment had awarded the husband the interest in his pension plan, and awarded the wife the interest in hers. The trial court entered the QDRO to attach assets in the wife’s pension plan after the wife failed to make a court-ordered cash payment to the husband. The appellate court reversed: “To order a QDRO on the wife’s pension plan is to create an interest in that asset which the final judgment extinguished. That is tantamount to a modification of the final adjudication of property rights in a divorce case, which is not permitted.” *Id.*

Similarly, in *Hoy v. Hoy*, 29 Va.App. 115, 510 S.E.2d 253 (1999) a divorce decree had awarded spousal support, but awarded no interest in the pension plan from which the wife sought to recover an alimony arrearage. The husband's interest in the pension plan did not exist at the time of the divorce. The appellate court found that a post-divorce order awarding the wife \$84,000 from the husband's pension plan was not a QDRO, but was instead an improper attempt to reopen and modify the divorce decree. *Id.* at 254. A QDRO, it held, must be consistent with the substantive provisions of the original decree and that statutory exception does not empower trial courts to make substantive modifications in the final divorce decree. *Id.*

In this case, the parties were divorced in 2009. They specifically bypassed the court to enter into a separate contract outside of the decree, and outside of the court's jurisdiction. The contract was never entered as a spousal support order. In Idaho, the only way a retirement account protected under ERISA can be accessed is through a QDRO. The only way to qualify for a QDRO after divorce is to have a valid order for support, and a state law which provides a support order exception to retirement account funds. The first element of the requirements is not present here. There is no support order to enforce, only a civil contract. Linda is no more than a money judgment creditor.

C. Appellant is Entitled to Attorney's Fees on Appeal.

James is entitled to attorney's fees on appeal pursuant to Rule 41 of the Idaho Appellate Rules and Idaho Code § 12-121. In *Crowley v. Critchfeld*, 145 Idaho 509, 181 P.3d 435 (2007), the Idaho Supreme Court held:

Attorney's fees may also be awarded if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Callaghan v. Callaghan*, 142 Idaho 185, 191, 125 P.3d 1061, 1067 (2005). I.C. § 12-121 grants the court the discretion to award attorney's fees.

Id., 145 Idaho at 514.

James' appeal is brought pursuant to both statutory and settled case law. As such, Linda's defense to the appeal will have no basis in Idaho or Federal law. There is no statutory basis for the district court to affirm the magistrate court's granting of a QDRO to Linda.

V.

CONCLUSION

Based upon the foregoing, James Kesting respectfully requests this Court vacate the Qualified Domestic Relations Order. Oral argument is requested.

DATED this 28th day of August, 2014.



Nikeela R. Black
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2014, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

Stanley W. Welsh
Matt Schelstrate
800 Park Blvd. Suite 790
P.O. Box 9518
Boise, ID 83707-9518

<u>X</u>	United States Mail, Postage Prepaid
<u> </u>	Overnight Courier
<u> </u>	Via Facsimile
<u> </u>	Hand Delivered



Nikeela R. Black

SEP 25 2014

CHRISTOPHER D. RICH, Clerk
By KATRINA THIESSEN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff/ Respondent,

Case No. CV OC 1400258

v.

JAMES A. KESTING,

Defendant/Appellant.

RESPONDENT'S BRIEF

**Appeal from the Magistrate Division of the District Court of
the Fourth Judicial District of the State of Idaho,
in and for the County of Ada**

Honorable Patricia G. Young, Magistrate Judge, Presiding

**Stanley W. Welsh, ISB #1964
Matt Schelstrate ISB #8276
COSHO HUMPHREY LLP
800 Park Blvd., Suite 790
Boise, Idaho 83707-9518**

Attorneys for Plaintiff/Respondent

**C. Thomas Arkoosh, ISB #2253
Nikeela R. Black, ISB #8834
ARKOOSH LAW OFFICES, PLLC
P.O. Box 2900
Boise, Idaho 83701**

Attorneys for Defendant/Appellant

000049 ORIGINAL

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	1
A.	Nature of the Case.....	1
B.	Procedural History.....	1
C.	Statement of Facts	1
II.	ADDITIONAL ISSUE ON APPEAL.....	4
A.	Linda should be awarded her attorney's fees and costs on appeal.....	4
III.	ARGUMENT	4
A.	The Order meets ERISA's requirements for a qualified domestic relations order and was properly issued by the Magistrate Court.....	6
(1)	Relates to Alimony Payments.....	8
(2)	Is Made Pursuant to a State Domestic Relations Law.....	10
B.	Idaho law expressly permits Linda to collect against James' 401(k).....	12
C.	The Order is not a modification of the 2009 divorce decree.....	14
D.	James is not entitled to his attorney's fees and costs on appeal.....	16
IV.	CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<i>Bainbridge v. Bainbridge</i> , 75 Idaho 13, 265 P.2d 662 (1954).....	11
<i>Baird v. Baird</i> , 843 S.W.2d 388 (Mo. Ct. App. 1992).....	6
<i>City of Sandpoint v. Sandpoint Indep. Highway Dist.</i> , 139 Idaho 65, 72 P.3d 905 (2003)	13
<i>Davidson v. Soelberg</i> , 154 Idaho 227, 296 P.3d 433 (Ct. App. 2013).....	10
<i>DeSantis v. DeSantis</i> , 714 So. 2d 637 (Fla. Dist. Ct. App. 1998).....	14
<i>Hogle v. Hogle</i> , 732 N.E.2d 1278 (Ind. 2000).....	6, 15
<i>Hoy v. Hoy</i> , 510 S.E.2d 253 (Va. 1999)	14, 15
<i>In re Marriage of Thomas</i> , 789 N.E.2d 821, 831 (Ill. Ct. App. 2003)	6
<i>Keeler v. Keeler</i> , 131 Idaho 442, 958 P.2d 599 (Ct. App. 1998).....	11
<i>Kimball v. Kimball</i> , 83 Idaho 12, 356 P.2d 919 (1960)	11
<i>Rife v. Rife</i> , 529 N.W.2d 280 (Iowa 1995).....	6
<i>Roesbery v. Roesbery</i> , 88 Idaho 514, 401 P.2d 805 (1965)	10
<i>Spencer–Steed v. Spencer</i> , 115 Idaho 338, 766 P.2d 1219 (1988)	10
<i>Stinner v. Stinner</i> , 554 A.2d 45 (Pa. 1989)	6, 10, 11
<i>Terteling v. Payne</i> , 131 Idaho 389, 957 P.2d 1387 (1998)	1, 2, 10

Statutes

26 U.S.C. § 71	9
26 U.S.C. § 71(b)(1)(A) & (D)	9
29 U.S.C. § 1056(d)(1)	7
29 U.S.C. § 1056(d)(3)(A)	7
29 U.S.C. § 1056(d)(3)(B)(i)	8
29 U.S.C. § 1056(d)(3)(B)(ii)(I)-(II).....	7,8,9
29 U.S.C. § 1056(d)(3)(B)(ii)	4
29 U.S.C. § 1144(c)(1).....	11
Idaho Code § 11-604A(3)	12, 13, 14
Idaho Code § 11-604A(3)	4, 13
Idaho Code § 11-607.....	4
Idaho Code § 11-607(1)(a)(1).....	12, 14
Idaho Code § 12-121.....	16,17

Treatises

<u>Collecting Child Support and Maintenance: A New Role for QDROs</u> , 69 Bench & Bar of Minn. 20, 22 (Oct. 2012)	15
<u>Qualified Domestic Relations Order Handbook</u> , § 1.04 (3 rd Ed. 2007).....	6
<u>Using QDROs to Enforce Spousal and Child Support</u> , 13 No. 1 Divorce Litig. 7 (Jan.2001).....	15

I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal was filed by Defendant/Appellant James A. Kesting ("James") from the Qualified Domestic Relations Order ("Order") entered on June 25, 2014 by the Honorable Patricia G. Young. His appeal challenges the legal basis for the entry of the Order.

B. Procedural History

Linda filed the original Complaint in this case on January 7, 2014 seeking \$6,400 in unpaid spousal support owed under the parties Alimony/Spousal Support Agreement. James filed an Answer to the Complaint admitting he had breached the Alimony/Spousal Support agreement and admitting Linda was entitled to the relief she requested. Linda then moved for judgment on the pleadings and ultimately received an \$8,000 judgment in her favor, plus attorney's fees and costs in the amount of \$1,227.80. Subsequently, Linda obtained a Writ of Execution, which was returned unsatisfied. Linda then obtained a Judgment of Qualified Domestic Relations Order on June 25, 2014, which directed that her judgments for unpaid spousal support and associated attorney's fees and costs be satisfied out of James' Terteling Employees Profit Sharing and Thrift Savings Plan 401(k). This appeal followed.

C. Statement of Facts

This case concerns unpaid spousal support. Incident to James and Linda's divorce on July 31, 2009, the parties entered into an Alimony/Spousal Support Agreement ("Agreement") on July 17, 2009. (Second Memorandum of Fees and Costs, filed July 2, 2014, Exhibit A). James agreed to pay Linda alimony/spousal support in the amount of \$1,600 until the "death or

remarriage of Linda or the death of Jay.” (*Id.*) In the Recitals section, the Agreement stated “The parties hereto on this date are stipulating to the entry of a Judgment and Decree of Divorce dissolving their marriage” and that “The parties have agreed that Jay shall pay to Linda spousal support/alimony as set forth hereinafter.” (*Id.*) The Agreement also provided that alimony/spousal payment was non-modifiable and that the Agreement was a separate contract. (*Id.*) For its part, the Judgment and Decree of Divorce states in Paragraph 6 the following: “**SPOUSAL SUPPORT:** Spousal Support is governed by a separate contract between the parties which is not part of this Decree and is not modifiable by this court.” (Judgment and Decree of Divorce, July, 31, 2009, p. 2, ¶ 6).¹

After James failed to make several months of alimony payments started in October of 2013, Linda filed suit for breach of the Agreement. (Plaintiff’s Complaint, at pp. 1-2). James admitted in his Answer that he owed unpaid spousal support and was in breach of the Agreement. (Defendant’s Answer, at ¶¶1-3). Ultimately, Linda obtained an \$8,000 judgment in her favor, plus attorney’s fees and costs in the amount of \$1,227.80. (Judgment entered February 28, 2014; Judgment entered March 27, 2014) As an alimony creditor, Linda then sought to satisfy the judgment out of James’s Terteling Employees Profit Sharing and Thrift

¹ Although the terms of the Judgment and Decree of Divorce were repeatedly referenced below and on appeal, the actual document does not appear to be part of the trial court record. Linda has filed a Motion to Augment the Record with this document.

Savings 401(k), but her Writ of Execution was returned unsatisfied. (Affidavit of Counsel in Support of Motion for Entry of Qualified Domestic Relations Order, Exh. A). Linda then filed a Motion for Entry of a Qualified Domestic Relations Order, which the Court entered in June 25, 2014. (Judgment of Qualified Domestic Relations Order, June 25, 2014). This Order was pre-approved by the Plan Administrator for James' 401(k). (Affidavit of Counsel in Support of Motion for Entry of Qualified Domestic Relations Order, Exh. C).

While post-judgment proceedings were still ongoing, Linda's counsel was provided with several documents.² First, Linda was provided copies of James' tax returns, which show he has deducted his alimony payments to Linda. Second, Linda was provided a statement for James' 401(k) showing a recent balance. Third, Linda was provided with a post-nuptial agreement executed by James and his current wife on June 30, 2014. (Declaration of Counsel in Support of Plaintiff's Supplemental Memorandum and Second Memorandum for Attorney's Fees, August 18, 2014, at Exh. A). The list of James property in Exhibit B to the post-nuptial agreement consists solely of "One Craftsman Toolbox with tools and One Lot Power tools," and nothing else. (*Id.*) However, a 401(k) is listed in his current wife's schedule of assets.³ (*Id.*)

² Although these documents were not placed into the record in the proceedings below, Linda has filed a Motion to Augment the Record because these documents are relevant to James' arguments on appeal.

³ Although this appears to be an attempt at a fraudulent transfer, it appears to be void as to a 401(k) and likely had no effect on the ownership of the 401(k), and therefore no effect on the posture of this appeal or the necessary parties.

II. ADDITIONAL ISSUE ON APPEAL

A. Linda should be awarded her attorney's fees and costs on appeal

Linda should be awarded her attorney fees and costs on appeal pursuant to the Alimony/Spousal Support Agreement and Rule 41 of the Idaho Appellate Rules. This appeal, just as the case below, concerns Linda's ongoing enforcement of her rights under the Agreement. Paragraph 3 of the Spousal Support Agreement states that "If action is required to enforce any of the provisions of this contract, the prevailing party shall be entitled to an award of all attorney fees and costs." Here, the Court should affirm the Order, find that Linda is the prevailing party, and enforce the terms of the parties' Agreement by awarding Linda her attorney's fees and costs.

III. ARGUMENT

This case presents the Court with this question: Can an alimony creditor collect unpaid alimony from an ERISA-qualified retirement plan via a qualified domestic relations order that complies with ERISA⁴ and Idaho law where the agreement to pay alimony was in a non-merged agreement entered into incident to divorce? The answer to this question is "yes." Alimony creditors can execute on otherwise exempt or anti-alienable assets like James' 401(k). *See* 29 U.S.C. § 1056(d)(3)(B)(ii); I.C. § 11-607; and I.C. § 11-604A(3). Both ERISA and Idaho law expressly permit the collection of spousal support arrearages against ERISA-qualified retirement plans, provided the collection is through a qualified domestic relations order ("QDRO") that complies with ERISA. The Magistrate Court's Judgment of Qualified Domestic Relations Order

⁴ Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056(d)(3)(B)(ii).

(“Order”) issued in this case complied with ERISA and Idaho law and should be affirmed by this Court.

James’ primary argument to the contrary involves drawing an artificial distinction without a difference. James bends over backwards to avoid any use of the terms “alimony” or “spousal support” in his briefing, but there is no question Linda is owed unpaid alimony and is an alimony creditor. There is no meaningful distinction between an alimony creditor pursuant to an alimony agreement (like Linda) and an alimony creditor pursuant to a court order from the divorce court). Because of her status as an alimony creditor, both Idaho and federal law expressly permit Linda to attach assets that are otherwise exempt or shielded from attachment by ordinary creditors, provided a QDRO is utilized.

In short, the Magistrate Court’s Order complied with the definition of a “qualified domestic relations order” under ERISA. Courts across the country have consistently permitted spousal support judgments to be collected against ERISA-qualified plans, provided a QDRO is used. In fact, nothing in federal or state law prohibits alimony creditors from collecting judgments for unpaid alimony against ERISA-qualified plans—in fact, the contrary is true. Alimony creditors are favored under both Idaho and Federal law and are expressly permitted to collect against assets that are otherwise exempt or anti-alienable.

Therefore, the Court should affirm the Magistrate Court’s Order.

A. The Order meets ERISA's requirements for a qualified domestic relations order and was properly issued by the Magistrate Court

The Order meets ERISA's requirements for a qualified domestic relations order and was properly issued by the Magistrate Court. First, under ERISA, there are two main uses for a QDRO. The most common use of a QDRO is to divide a retirement plan upon divorce. But QDRO's also can be used to satisfy judgments for spousal support arrearages. This is the conclusion of the vast majority of courts that have addressed the issue. *See, e.g., Stinner v. Stinner*, 554 A.2d 45 (Pa. 1989); (holding that an alimony judgment arising out of breach of an alimony contract could be enforced via a QDRO); *Hogle v. Hogle*, 732 N.E.2d 1278 (Ind. 2000) (holding that a QDRO can be used to garnish a retirement plan to satisfy past due support obligations); *Rife v. Rife*, 529 N.W.2d 280 (Iowa 1995) (holding that ERISA was not a bar to enforcing support claim against pension plan); *Baird v. Baird*, 843 S.W.2d 388 (Mo. Ct. App. 1992) (holding that QDRO can be used to enforce delinquent support obligations); *In re Marriage of Thomas*, 789 N.E.2d 821, 831 (Ill. Ct. App. 2003) (agreeing with the "quantum of persuasive authority" permitting use of a QDRO to assign retirement benefits to satisfy past due maintenance and child support obligations); *see also* Gary A. Shulman, Qualified Domestic Relations Order Handbook, § 1.04 (3rd Ed. 2007) ("QDROs are useful not only in divorce situations. QDROs can also be utilized for child support or spousal support purposes, including the collection of past-due child support or spousal support arrearages.").

Second, a QDRO can properly be used to satisfy a spousal support arrearage when the spousal support is pursuant to a non-modifiable contract entered into incident to divorce. There is no basis to draw the distinction that James repeatedly draws in his briefing. Linda is owed

alimony pursuant to agreement. She is no less and no more an alimony creditor than any former spouse owed alimony under a divorce decree or court order. Whether Linda can satisfy her judgment for unpaid alimony against James' 401(k) turns primarily on whether the Order she obtained from the Magistrate Court complies with federal law, specifically the Employee Retirement Income Security Act ("ERISA").

ERISA is a comprehensive federal law governing certain retirement accounts. The parties in this case do not dispute that ERISA applies to James' 401(k). ERISA has a general anti-alienation provision that states the following: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). However, this anti-alienation provision has a key exception, which is that qualified domestic relations orders (QDROs) can be used to access otherwise un-assignable or anti-alienable assets. This is because ERISA goes on to state that the anti-alienation provision quoted above "shall not apply if the order is determined to be a qualified domestic relations order." 29 U.S.C. § 1056(d)(3)(A). Further, ERISA affirmatively requires that "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." *Id.* Therefore, ERISA does not bar the assignment or alienation of benefits in James 401(k) because the Order Linda obtained is a qualified domestic relations order.

Under ERISA, a domestic relations order "means any judgment, decree, or order (including approval of a property settlement agreement) which – (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including community property law). 29 U.S.C. § 1056(d)(3)(B)(i)(I)-(II). If the Order in this

case is domestic relations order, the Order must also be “qualified” under 29 U.S.C. § 1056(d)(3)(B)(i). However, whether the Order is qualified was not disputed or argued below and is not challenged or otherwise at issue on this appeal. The only issue is whether the Order is a “domestic relations order” under 29 U.S.C. § 1056(d)(3)(B)(ii)(I)-(II).

James argues without citation to any authority that there must have been a spousal support order for support in the 2009 divorce in order for the Order to be valid. This not only ignores ERISA’s plain text, it ignores a key piece of Idaho domestic relations law, that of non-merged, non-modifiable alimony agreements. Further, there is no legal authority—and James cites none—that says if party enters into a separate, non-merged alimony contract, that party cannot later obtain a QDRO and seek to collect the unpaid alimony against otherwise exempt or anti-alienable assets. What James misses is that the qualified domestic relations order at issue here is the Order the Magistrate Court issued. The fact that there never was a court order for alimony entered in the 2009 divorce is irrelevant. The only relevant question is whether the Order *in this case* complies with ERISA. It does.

(1) Relates to Alimony Payments.

First, the Order must “relate” to “alimony payments” to a former spouse. 29 U.S.C. § 1056(d)(3)(B)(ii)(I). Here, there is no question that the Order relates to alimony payments to a former spouse. James appears to take the perplexing position that the payments due under the Alimony/Spousal Support Agreement, which terminate upon the death or remarriage of Linda and which Agreement was entered into incident to a divorce, *are not* alimony or spousal support payments. For example, James repeatedly refers to the Alimony/Spousal Support Agreement as a

settlement contract” (*Id.*). James consistently refers to the payments as mere “monthly payments” (*Id.* at 6) and Linda as being a “money judgment creditor” (*Id.* at 1). He calls the title of the Alimony/ Spousal Support Agreement “irrelevant” (*Id.* at 3).

James’ position is all the more perplexing considering that James deducted his payments as alimony on his tax returns.⁵ There is no question that James owed alimony and breached an agreement to pay alimony. There is certainly no question that his payments qualified under 26 U.S.C. § 71, which defines alimony and separate maintenance for federal tax purposes. Under that Code provision an “alimony or separate maintenance payment” must (among other things) be a cash payment received “under a divorce or separation instrument” without any “liability to make any such payment for any period after the death of the payee spouse.” 26 U.S.C. § 71(b)(1)(A) & (D). The Agreement here provides for both. James’ position is also surprising considering he admitted that he failed to make spousal support payments. (Defendant’s Answer, at ¶¶1-3). James’ position apparently is the payments are alimony when it comes to tax time, but not alimony when it comes to the law’s favored treatment of a former spouse owed alimony. It is James, not Linda, who is playing “fast and loose” with the courts (and the IRS).

There is no question that the Order the Magistrate Court entered related to alimony payments. James nonetheless attempts to draw a distinction under ERISA for alimony payments by court order and alimony payments by agreement. He argues—again, without any citation to authority—that a QDRO must relate to a “valid support order” (Appellant’s Br. at 7). First, this alters the plain meaning of 29 U.S.C. § 1056(d)(3)(B)(ii)(I), which states the order must only

⁵ Linda has filed a separate Motion to Augment the Record to include the tax returns.

relate to alimony payments. James' argument is based on his own rewrite of the statute. Non-merged alimony contracts have never been treated as second class citizens or any differently from alimony orders—certainly, the IRS views them no differently. Linda is not a mere money judgment creditor and never was.

There is no authority supporting James' distinction. In fact, there is authority otherwise. In *Stinner v. Stinner*, 554 A.2d 45 (Pa. 1989), the beneficiary of an alimony agreement filed suit to collect unpaid alimony owed pursuant to a contract. After obtaining a judgment, she then sought a writ of execution against a pension plan. The court ruled that the alimony judgment she obtained was a qualified domestic relations order. It was (1) an order of the court; (2) that related to the decisional domestic relations law that upheld alimony contracts entered into in contemplation of divorce; and (3) it related to alimony payments. The *Stinner* court expressly rejected the argument that a QDRO was impermissible just because the alimony was agreed to in a contract. 554 A.2d at 47-48.

Therefore, the Order relates to alimony payments and meets that requirement of ERISA.

(2) Is Made Pursuant to a State Domestic Relations Law.

Not only does the Order relate to alimony payments, it was also made pursuant to Idaho's domestic relations law. Idaho's domestic relations law has a long tradition of recognizing and upholding separate contracts for alimony that are not merged into divorce decrees, but are entered into incident to divorce. *See, e.g., Davidson v. Soelberg*, 154 Idaho 227, 230, 296 P.3d 433, 436 (Ct. App. 2013); *Terteling v. Payne*, 131 Idaho 389, 393–94, 957 P.2d 1387, 1391–92 (1998); *Spencer–Steed v. Spencer*, 115 Idaho 338, 344, 766 P.2d 1219, 1225 (1988); *Roesbery v.*

Roesbery, 88 Idaho 514, 521, 401 P.2d 805, 809 (1965); *Kimball v. Kimball*, 83 Idaho 12, 16,

356 P.2d 919, 922 (1960); *Bainbridge v. Bainbridge*, 75 Idaho 13, 23–24, 265 P.2d 662, 669 (1954); *Keeler v. Keeler*, 131 Idaho 442, 444–45, 958 P.2d 599, 601–02 (Ct. App. 1998).

These agreements are reached in order to avoid the future modification of the alimony payment, which is permitted with a court order for alimony (provided there is shown a substantial change in circumstances). That is the main reason family law practitioners counsel for or against separate alimony contracts. As set forth above, these contracts create obligations to pay alimony—they are not mere agreements to make “monthly payments,” as James suggests throughout his briefing. Therefore, Linda’s right to alimony is grounded in Idaho’s decisional domestic relations law—her concomitant right to enforce the judgments for unpaid alimony via the Magistrate Court’s Order is likewise grounded in Idaho’s decisional domestic relations law.

Further, James’ argument was expressly rejected by the one court that has addressed the “contract *versus* order” argument that James makes. The *Stinner* court rejected the lower court’s finding that the former spouse’s right to alimony “was based solely on contract and not the domestic relations law” of Pennsylvania, and hence could not be a qualified domestic relations order. The court ruled this was a “myopic view of the word law.” 554 A.2d at 48. Recognizing that these agreements were a part of Pennsylvania’s decisional domestic relations law, the *Stinner* court noted the definition of State law under ERISA, which includes “all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.” 554 A.2d at 48 (citing 29 U.S.C. § 1144(c)(1)). The court ultimately found that because the agreement for alimony was found upon Pennsylvania’s decisional domestic relations law, upon its breach, the court could issue QDRO, and that QDRO was pursuant to the same domestic relations law that permitted the alimony agreement in the first place. *Id.*

Same result here. The Magistrate Court has the jurisdiction to enforce alimony agreements. Because the Agreement was founded on Idaho's decisional domestic relations law, so too is the Magistrate Court's Order. To find otherwise would carve out a whole class of alimony creditors and relegate them to a second-class status—a result directly contrary to the favored status of alimony creditors under ERISA and Idaho law. There is no authority for such a result.

B. Idaho law expressly permits Linda to collect against James' 401(k)

Although the primary issue in this case is one of federal law, Idaho law also supports Linda's position in this matter. Consistent with ERISA, there is no bar under Idaho law to Linda collecting alimony against James' retirement plan—in fact, alimony creditors are given favored treatment. I.C. § 11-607(1)(a)(1) expressly states that a creditor “can make a levy against exempt property to enforce a claim for 1. Alimony, support, or maintenance” I.C. § 11-607(1)(a)(1).

James argues in a footnote that I.C. § 11-607(1)(a)(1) is not applicable and that I.C. § 11-604A(3) governs. This is because I.C. § 11-607(1) states “notwithstanding other provisions of this act . . .” and I.C. § 11-604A was not part of the same “act.” This argument ignores that when I.C. § 11-604A(3) was enacted, I.C. § 11-607 was on the books, yet was never amended. In other words, if James is correct that I.C. 11-604A(3) was meant to protect his 401(k) from alimony creditors, it would be odd that the Legislature would leave I.C. § 11-607 undisturbed. This argument reflects an unduly narrow interpretation of term “act” that would require an understanding of each particular session law or amendment that comprises Title 11 and when each was enacted. This would force a disjointed reading of Title 11, as well as every other statute that contains the same phrase. Instead, the proper rule is to read the two statutes in *pari materia*.

See City of Sandpoint v. Sandpoint Indep. Highway Dist., 139 Idaho 65, 72 P.3d 905 (2003). Statutes are in *pari materia* “if they relate to the same subject.” *Id.* at 69, 72 P.3d at 909. Statutes that are in *pari materia* “must be construed together to effect legislative intent.” *Id.*

Here, I.C. § 11-604A(3) and I.C. § 11-607 are in harmony and support Linda’s position. I.C. § 11-604A(3) states that while pensions are exempt from execution, that protection does not apply to benefits payable to a former spouse “to the extent expressly provided for in a qualified domestic relations order that meets the requirements for those orders under the plan” I.C. § 11-604A(3). While James admits that the “statute does allow for the use of a QDRO along the same lines as the federal law,” James then misreads the rest of the statute to claim the exemption in the statute only applies “to the extent provided in any order issued by a court of competent jurisdiction that provides for maintenance or support.” Although the Order in this case would still qualify under this definition, this part of the statute is not applicable to the retirement plan at issue here, which the parties have never disputed is a 401(k) plan. (*See e.g.*, James’ *Memorandum in Opposition to Motion for Entry of Qualified Domestic Relations Order*, filed June 20, 2014, at p. 2). A correct reading of I.C. § 11-604A(3) shows that this section of the statute is phrased in the disjunctive. The statute states:

This subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in the plan to the extent expressly provided for in a qualified domestic relations order that meets the requirements for those orders under the plan, or, in the case of benefits payable under a plan described in sections 403(b), 408, 408A or 457 of the Internal Revenue Code of 1986, as amended, or section 409 of the Internal Revenue Code as in effect before January 1, 1984, to the extent provided in any order issued by a court of competent jurisdiction that provides for maintenance or support.

I.C. § 11-604A(3) (emphasis added).

The italicized portion of section (3) is what applies here. The placement of the word “or” shows that the final sentence is only applicable to plans described in sections 403(b), 408, 408A, or 457 of the Internal Revenue Code. James’ plan is not under any of these sections. Rather, no one disputes that James’ Plan is under section 401(k) of the Internal Revenue Code.

Therefore, I.C. 11-604A(3) permits Linda to collect her unpaid alimony against James’ 401(k). Linda has obtained a qualified domestic relations order. The Plan Administrator has already approved the Order and confirmed it meets the requirements for those orders under the plan. I.C. § 11-607(1)(a)(1) expressly states that alimony creditors can garnish assets that are otherwise exempt under other provisions of the act. These statutes should be read in harmony. Read together, alimony creditors like Linda are authorized to obtain QDRO’s to levy against otherwise exempt retirement assets like those at issue here. Idaho law not only permits it, but actually favors the collection of alimony in this situation.

C. The Order is not a modification of the 2009 divorce decree

The Order entered by the Magistrate Court is not an impermissible modification of the 2009 divorce decree. James cites in support of this position is *DeSantis v. DeSantis*, 714 So. 2d 637 (Fla. Dist. Ct. App. 1998) and *Hoy v. Hoy*, 510 S.E.2d 253 (Va. 1999). *DeSantis* had nothing to do with spousal support arrearages and *Hoy* has been widely criticized and reflects the (tiny) minority position. First, *DeSantis* involved an equalization payment, not a spousal support arrearage. In the divorce, the parties were each awarded their pensions and wife was ordered to make an equalization payment. When she failed to do so, the husband sought to execute on her pension. The Court ruled that created an interest in an asset the final judgment extinguished.

What is different here is that not only does Linda have a judgment for unpaid alimony, the asset

here is a 401(k) as opposed to a pension. Further, even if *DeSantis* were correct, the logic of the decision would only extend to the 401(k) balance in the account at the time of divorce, and not future growth or contributions, which never existed at the time of the divorce.⁶ In any event, *DeSantis* is against the majority of the decisions across the country that have addressed the issue.

James' reliance on *Hoy* is also misplaced. In *Hoy*, the party seeking the QDRO obtained a judgment for unpaid alimony in the amount of \$84,000 some 12 years after the divorce. There was no state statute in effect at the time that contemplated the entry of qualified domestic relations order, unlike in Idaho. The court ruled that a QDRO was an impermissible modification of the divorce decree. *Hoy* is not only factually distinguishable, it has been widely criticized and reflects the minority position on this issue. See, e.g., *Hogle*, 732 N.E.2d at 1283-84 (rejecting *Hoy*'s reasoning in favor of the majority position that a QDRO can be used to enforce support arrearages); Michael P. Boulette, Collecting Child Support and Maintenance: A New Role for QDROs, 69 Bench & Bar of Minn. 20, 22 (Oct. 2012) (noting that the use of QDROs to enforce past due support has "received increasing approval across the country" and that "the reasoning employed by the Virginia court in *Hoy* does not appear to have gained wide acceptance"); Laura W. Morgan, Using QDROs to Enforce Spousal and Child Support, 13 No. 1 Divorce Litig. 7 (Jan.2001) ("Congress has made it clear that QDROs may be used to enforce spousal and child support obligations. To do so is not an impermissible modification of a property division award, but only a means of enforcement of an obligation. It is time Virginia reversed the *Hoy* decision and got with the program.").

⁶ As noted above, Linda has filed a Motion to Augment the Record to include a recent 401(k) statement and the Judgment and Decree of Divorce. Comparison of these shows the growth in James' 401(k) since the divorce.

Therefore, not only is James' authority unpersuasive, he cites no persuasive authority that suggests that collecting a judgment against property awarded to an ex-spouse in a divorce decree is somehow a modification of the decree. Not only is there no persuasive authority for this position, James' argument that this is a modification of the property settlement agreement is logically flawed. Under James' reasoning, a party could immediately default on support obligations after divorce and then argue he or she is judgment proof because the only assets available to satisfy the judgment were awarded to them in the decree. There is no support for this result, which is actually contrary to the special position granted to alimony and child support creditors under Idaho law.

At heart, James is arguing to the Court that he can default on the obligation he assumed as part of the divorce settlement, but then shield his assets from collection because they were awarded to him in the Decree. The Court should reject this reasoning, just as the Magistrate Court rejected it. Linda is not seeking to alter or modify the initial property division, but is seeking to satisfy a judgment for unpaid alimony against property that is non-exempt under Idaho and federal law. It would be strange if the Idaho Legislature specifically provided that retirement plans are non-exempt as to alimony claims when this benefit would be essentially meaningless because most of these collection actions would entail impermissible post-divorce property modifications.

D. James is not entitled to his attorney's fees and costs on appeal

James argues that his appeal is "brought pursuant to both statutory and settled case law" and that therefore Linda's defense will not be. James therefore seeks fees under I.C. § 12-121 for frivolousness. Oddly, James does not request fees pursuant to the Alimony/Spousal Support

Agreement. This is consistent with his approach throughout this case, one of soft-pedaling or ignoring the *alimony* agreement. In fact, Linda has prevailed throughout this litigation and her defense of this appeal is well-supported by the facts and the law. There is no basis for James to be awarded fees under I.C. § 12-121.

IV. CONCLUSION

The Judgment of Qualified Domestic Relations Order should be affirmed.

DATED this 25 day of September, 2014.

COSHO HUMPHREY, LLP



MATT SCHELSTRATE

STANLEY W. WELSH

Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 25 day of September, 2014, a true and correct copy of the within and foregoing instrument was served upon:

C. Thomas Arkoosh
Nikeela R. Black
Arkoosh Law Offices, PLLC
802 W. Bannock Street, Suite 900
P.O. Box 2900
Boise, Idaho 83701
Served by: Hand Delivery



MATT SCHELSTRATE

NO. _____ FILED _____
 A.M. _____ P.M. **4:30**

OCT 16 2014

CHRISTOPHER D. RICH, Clerk
 By CHARLOTTE WATSON
 DEPUTY

*MAGISTRATE
 APPEALS
 Judge - Schwoerer
 R.C.
 10/16/2014
 aw*

ORIGINAL

**IN THE DISTRICT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
 OF IDAHO, IN AND FOR THE COUNTY OF ADA**

LINDA C. KESTING,

Appellee,

Case No. CV OC 1400258

vs.

JAMES A. KESTING,

Appellant,

APPELLANT'S REPLY BRIEF

**On appeal from the District Court of the Fourth Judicial District of the
 State of Idaho, in and for the County of Ada, Magistrate Division
 The Honorable Patricia Young, Presiding**

Stanley W. Welsh, ISB #1964
 Matt Schelstrate, ISB #8276
 COSHO HUMPHREY, LLP
 800 Park Blvd. Suite 790
 P.O. Box 9518
 Boise, ID 83707-9518
Attorneys for Appellee Linda Kesting

C. Tom Arkoosh, ISB #2253
 Nikeela R. Black, ISB #8834
 ARKOOSH LAW OFFICES, PLLC
 802 W. Bannock Street, Suite 900
 P. O. Box 2900
 Boise, ID 83701
Attorneys for Appellant James Kesting

aw

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES	ii
I. STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Factual Background and Procedural History	1
II. ISSUES PRESENTED ON APPEAL	1
III. STANDARD OF REVIEW	1
IV. ARGUMENT	2
A. Non-merged agreements are not equivalent to court orders	2
B. Idaho Code Section 11-607 does not preclude 11-604A	3
C. Form of QDRO not at issue	4
V. CONCLUSION	4
CERTIFICATE OF SERVICE	5

TABLE OF CASES AND AUTHORITIES

CASES

<i>Bainbridge v. Bainbridge</i> , 75 Idaho 13, 23-24, 265 P.2d 662, 669 (1954)	2
<i>Clements Farms, Inc. v. Ben Fish & Son</i> , 120 Idaho 185, 814 P.2d 917 (1991).....	1
<i>Hentges v. Hentges</i> , 115 Idaho 192, 194 (Ct. App. 1988)	1
<i>Keeler v. Keeler</i> , 131 Idaho 442, 444-45, 958 P.2d 599, 601-02 (Ct.App.1998)	2
<i>Kimball v. Kimball</i> , 83 Idaho 12, 16, 356 P.2d 919, 922 (1960)	2
<i>Roesbery v. Roesbery</i> , 88 Idaho 514, 521, 401 P.2d 805, 809 (1965)	2
<i>Spencer-Steed v. Spencer</i> , 115 Idaho 338, 344, 766 P.2d 1219, 1225 (1988).....	2
<i>State v. Kenner</i> , 121 Idaho 594, 826 P.2d 1306, 1308 (1992).....	1
<i>Terteling v. Payne</i> , 131 Idaho 389, 393-94, 957 P.2d 1387, 1391-92 (1998)	2

CODES/RULES/STATUTES

Idaho Code § 11-604A.....	3, 4
Idaho Code § 11-607.....	3
Idaho Code § 12-117.....	1
Idaho Code § 12-123.....	1
I.R.C.P. 83(u)(1)	1
1996 Idaho Laws Ch. 309 (H.B. 751)	3

I. STATEMENT OF THE CASE

A. Nature of the Case

Appellant restates, and by this reference incorporates, the section of Appellant's Opening Brief entitled, "Nature of the Case," as if it were set forth fully herein.

B. Factual Background and Procedural History

Appellant restates, and by this reference incorporates, the section of Appellant's Opening Brief entitled, "Factual Background and Procedural History," as if it were set forth fully herein.

II. ISSUES PRESENTED ON APPEAL

- 1. Whether Judge Young erred as a matter of law by treating James and Linda Kesting's separate civil contract as a Spousal Support Order;**
- 2. Whether Judge Young erred as a matter of law by granting a Qualified Domestic Relations Order to a money judgment creditor in violation of state and federal law; and,**
- 3. Whether Appellant is entitled to attorney costs and fees under Idaho Code §§ 12-117 and 12-123.**

III. STANDARD OF REVIEW

When a District Judge considers an appeal from a Magistrate Judge, the District Judge is acting as an Appellate Court, not as a Trial Court. *State v. Kenner*, 121 Idaho 594, 826 P.2d 1306, 1308 (1992); I.R.C.P. 83(u)(1). Accordingly, the standards of review are the same as those applied by the Idaho Supreme Court or Court of Appeal in a regular appeal: the District Court upholds the lower court's factual findings if based on substantial and competent, though conflicting, evidence; and affirms conclusions of law which demonstrate proper application of legal principles to the facts found. *Hentges v. Hentges*, 115 Idaho 192, 194 (Ct. App. 1988). Where issues on appeal involve questions of law, a reviewing court exercises free review. *Clements Farms, Inc. v. Ben Fish & Son*, 120 Idaho 185, 814 P.2d 917 (1991).

IV. ARGUMENT

A. Non-merged agreements are not equivalent to court orders.

Both ERISA and Idaho law expressly permit the collection of spousal support arrearages against ERISA-qualified retirement plans, provided the collection is through a qualified domestic relations order ("QDRO") that complies with ERISA. If James and Linda had merged the separate agreement into the 2009 decree, it would be a court order for alimony and Linda would be able to collect delinquent payments via a QDRO; but, that is not the case here.

Linda claims that "A QDRO can properly be used to satisfy a spousal support arrearage when the spousal support is pursuant to a non-modifiable contract entered into incident to divorce." (Respondent's Brief at p. 6). Yet, Linda provides no case law or citations to support that statement. Instead, established case law supports just the opposite; non-merged agreements are subject to contract law, and are not considered alimony orders. *See, Terteling v. Payne*, 131 Idaho 389, 393-94, 957 P.2d 1387, 1391-92 (1998); *Spencer-Steed v. Spencer*, 115 Idaho 338, 344, 766 P.2d 1219, 1225 (1988); *Roesbery v. Roesbery*, 88 Idaho 514, 521, 401 P.2d 805, 809 (1965); *Kimball v. Kimball*, 83 Idaho 12, 16, 356 P.2d 919, 922 (1960); *Bainbridge v. Bainbridge*, 75 Idaho 13, 23-24, 265 P.2d 662, 669 (1954); *Keeler v. Keeler*, 131 Idaho 442, 444-45, 958 P.2d 599, 601-02 (Ct.App.1998).

Linda claims, "the fact that there was never a court order for alimony entered in the 2009 divorce is irrelevant. The only relevant question is whether the Order *in this case* complies with ERISA." (Respondent's Brief at p. 8). These two statements are wholly incorrect. First, whether there is a valid alimony order from the 2009 divorce is very relevant. Second, whether the QDRO entered by Honorable Judge Young, based on a generic judgment, meets the standard of ERISA is not relevant unless we get past the first question of whether there is even a valid alimony order from

a court to enforce. In this case, there is not. The agreement between the parties was a separate non-merged contract, which, therefore, never became an alimony order as required to qualify for an exception under ERISA's anti-alienation provisions.

Linda states, "There is no meaningful distinction between an alimony creditor pursuant to an alimony agreement (like Linda) and an alimony creditor pursuant to a court order from the divorce court." (Respondent's Brief at p. 5). Linda calls herself an "alimony creditor" and, as such, she is expressly permitted to attach assets that are otherwise exempt or shielded from attachment by ordinary creditors. This is not true, however, because as explained above, there is no alimony order.

B. Idaho Code Section 11-607 does not preclude 11-604A.

Under state law, which is consistent with federal law, a Qualified Domestic Relations Order for child support or alimony is required to access exempt retirement funds. *See*, I.C. § 11-604A. In her response brief, Linda continues to argue that I.C. § 11-607 is the appropriate statute and that the two statutes (I.C. § 11-604A and I.C. § 11-607) are *in pari material*. (Respondent's Brief at p. 13). As argued in Appellant's Brief at p. 8, I.C. § 11-607 specifically states that it only governs claims against exempt property "notwithstanding other provisions of this act." I.C. § 11-604A is not part of the act. Idaho Code § 11-607 was passed in 1978. I.C. § 11-604A was passed in 1996 and was, therefore, not a provision of the 1978 act. The "Statement of Purpose" provided in the legislative notes for I.C. § 11-604A states:

"Federal Law exempts pension plans from legal process, but does not include Individual Retirement Accounts (IRA) in the exemption. Certain individuals have been required to roll over pension funds into an IRA and such funds could be vulnerable to attachment in court actions without this exemption. Several states already have this exemption which is provided for in this legislation."

ENFORCEMENT OF JUDGMENTS—ATTACHMENT AND LEVY—EXEMPTION FOR PENSION FUNDS ROLLED INTO INDIVIDUAL RETIREMENT ACCOUNTS, 1996 Idaho Laws Ch. 309 (H.B. 751).

From that statement of purpose two things are clear. First, that the legislature acknowledges that federal law preempts state law in regards to exempt pension plans. Secondly, that the legislature intended to extend the exemption in regards to retirement plans by adding I.C. § 11-604A.

C. Form of QDRO not at issue.

Linda argues that she is entitled to James' exempt retirement funds because she obtained a QDRO and because the Plan Administrator approved the QDRO. James does not contest whether the Qualified Domestic Relations Order filed by Linda conforms to the administrative requirements of the specific qualified plan. Plan Administrators approve or disapprove a QDRO based on form, not whether it is provided for by law. Rather, James asserts that where there is a non-merged, separate agreement between parties, it does not result in an alimony order, and therefore a QDRO is not allowed under either state or federal law because there is no underlying alimony order. In this case, the Magistrate Judge incorrectly granted a QDRO based on no underlying alimony order from the original divorce decree, and a generic money judgment.

V. CONCLUSION

Based upon the foregoing, James Kesting respectfully requests this Court vacate the Qualified Domestic Relations Order.

DATED this 16th day of October, 2014.



Nikeela R. Black
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of October, 2014, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

Stanley W. Welsh
Matt Schelstrate
800 Park Blvd. Suite 790
P.O. Box 9518
Boise, ID 83707-9518

<u>X</u>	United States Mail, Postage Prepaid
<u> </u>	Overnight Courier
<u> </u>	Via Facsimile
<u> </u>	Hand Delivered

Nikeela R. Black
Nikeela R. Black

DEC 29 2014

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,)	
)	
)	Case No. CV-OC-2014-00258
)	
Plaintiff/Respondent,)	
)	
vs.)	OPINION ON APPEAL
)	
JAMES A. KESTING,)	
)	
)	
Defendant/Appellant.)	
_____)	

ATTORNEY FOR THE DEFENDANT/APPELLANT: C. TOM ARKOOSH

ATTORNEY FOR THE PLAINTIFF/RESPONDENT: STANLEY W. WELSH

James Kesting appeals from a decision by a magistrate concerning entry of a
"judgment of qualified domestic relations order."

FACTS AND PROCEDURAL BACKGROUND

The following is derived from Linda's brief and appears to be undisputed:

Linda filed the original Complaint in this case on January 7, 2014 seeking \$6,400 in unpaid spousal support owed under the parties' Alimony/Spousal Support Agreement. James filed an Answer to the Complaint admitting he had breached the Alimony/Spousal Support agreement and admitting Linda was entitled to the relief she requested. Linda then moved for judgment on the pleadings and ultimately received an \$8,000 judgment in her favor, plus attorney's fees and costs in the amount of \$1,227.80. Subsequently, Linda obtained a Writ of Execution, which was returned unsatisfied. Linda then obtained a Judgment of Qualified Domestic Relations Order on June 25, 2014, which directed that her judgments for unpaid spousal support and associated attorney's fees

and costs be satisfied out of James' Terteling Employees Profit Sharing and Thrift Savings Plan 401(k). This appeal followed. Respondent's Brief, at 1.

STANDARD OF REVIEW

When a district judge considers an appeal from a magistrate judge, not involving a trial de novo, the district judge is acting as an appellate court, not as a trial court. *State v. Kenner*, 121 Idaho 594, 596, 826 P.2d 1306, 1308 (1992). The interpretation of law or statute is a question of law over which the Court has free review. *State v. Miller*, 134 Idaho 458, 462, 4 P.3d 570, 574 (Ct. App. 2000). "The magistrate's findings of fact will be upheld if they are supported by substantial and competent evidence." *Hoskinson v. Hoskinson*, 139 Idaho 448, 454, 80 P.3d 1049, 1055 (2003).

ISSUES

James asserts the following issues in this appeal: (1) "[w]hether Judge Young erred as a matter of law by treating James and Linda Kesting's separate civil contract as a Spousal Support Order;" (2) "Whether Judge Young erred as a matter of law by granting a Qualified Domestic Relations Order to a money judgment creditor in violation of state and federal law;" and (3) "Whether Appellant is entitled to attorney costs and fees under Idaho Code §§ 12-117 and 12-123."¹ Appellant's Brief, at 2.

1. Judgment of Qualified Domestic Relations Order

James contends that the magistrate erred in issuing the "judgment of qualified domestic order," under the circumstances.

¹In the argument section of his brief, James argues he "is entitled to attorney fees on appeal pursuant to Rule 41 of the Idaho Appellate Rules and Idaho Code § 12-121. Appellant's Brief, at 10. The court will consider this as his actual request since it appears to be more applicable and since it is asserted in the argument section of his brief.

The judgment and decree of divorce stated "SPOUSAL SUPPORT: Spousal support is governed by a separate contract between the parties **which is not part of this Decree and is not modifiable by this court.**" Judgment and Decree of Divorce (July 31, 2009), at 2. (emphasis in original, except bold emphasis added).

The "alimony/spousal support agreement" provides:

1. PAYMENT OF SPOUSAL SUPPORT/ALIMONY: Jay shall pay to Linda alimony/spousal support in the amount of \$1,400 every two weeks commencing on June 11, 2009 and payable every other Thursday thereafter (i.e. in June 2009 Jay shall pay support of June 11th and June 25th, in July 2009 he will pay support on July 9th and July 23rd and shall continue to pay every other Thursday).

Provided, however, on the first day of the month after the closing of the sale of the residence located at 1399 North Watson, Eagle, Idaho, the spousal support/alimony payment shall change to the amount of \$1,600 paid on the first day of each month.

Provided, further, the spousal support/alimony payments shall terminate immediately upon the death or remarriage of Linda or the death of Jay.

2. MODIFICATION: Neither party shall have the right to request that any court modify the alimony/spousal support payments. This shall remain a separate contract and does not constitute a court order. Alimony/Spousal Support Agreement, at 1 (emphasis in original).

This action was initiated by a complaint filed by Linda seeking to enforce the terms of the contract. See Complaint, at 1. "The parties entered into a contract requiring Defendant to pay to Plaintiff alimony/spousal support . . . Pursuant to the terms of their contract, Defendant is obligated to pay to Plaintiff the sum of \$1,600 on the first day of each month."

"When a spousal support obligation arises only from a settlement agreement, the right to enforce the spousal support obligation rests on the contract. However, when a settlement agreement is incorporated, or 'merged,' into a divorce decree, the agreement

becomes enforceable only as a part of the decree, and not as a separate contract.” *Davidson v. Soelberg*, 154 Idaho 227, 230, 296 P.2d 433, 436 (Ct. App. 2013) (citations omitted).

“The proper analysis is to look first only to the four corners of the divorce decree. If the language of the decree clearly and unambiguously holds the property settlement agreement is not merged, the inquiry is at an end. The court’s inquiry will move beyond the four corners of the decree to the property settlement agreement only when the decree is ambiguous and reasonably susceptible to conflicting interpretations.” 154 Idaho at 231, 296 P.3d at 437.

The divorce decree, recounted above, is unambiguous. The spousal support obligation was not merged with the divorce decree. Therefore, the right to enforce the spousal support obligations rests on the contract.

“A QDRO [qualified domestic relations order] is a domestic relations order **made pursuant to a state domestic relations law**, 29 U.S.C.A. § 1056(d)(3)(B)(ii)(II), which ‘creates or recognizes the existence of an alternate payee’s right to, or assigns to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant of the plan,’ 29 U.S.C.A. § 1056(d)(3)(B)(i)(I) and ‘relates to the provision of . . . alimony payments, or marital property rights to a spouse, former spouse . . .’ 29 U.S.C.A. § 1056(d)(3)(B)(ii)(I).” *Maslen v. Maslen*, 121 Idaho 85, 92 n. 7, 822 P.2d 982, 989 n. 7 (1991) (emphasis added).

“Prior to 1984, ERISA [Employee Retirement Income Security Act] prohibited the alienation or assignment of pension plan benefits . . . In 1984, Congress amended ERISA by enacting the Retirement Equity Act . . . which allowed a participant to alienate

or assign pension benefits under a domestic relations order so long as the order is 'determined to be a qualified domestic relations order.' See 29 U.S.C. § 1056(d)(3)(A) . . . A 'domestic relations order' is defined as 'any judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, or other dependent of a participant, and is made pursuant to a State domestic relations law (including community property law).' 29 U.S.C. § 1056(d)(3)(B)(ii)(I)-(II)." *Green v. Green*, 899 F.Supp.2d 291, 297-98 (D. N.J. 2012).

"A valid DRO [domestic relations order] can be any judgment, decree, or order which (1) 'relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant,' and (2) 'is made pursuant to a State domestic relations law.' 29 U.S.C. § 1056(d)(3)(B)(ii)." *Carmona v. Carmona*, 603 F.3d 1041, 1054 (9th Cir. 2010).

The judgment of qualified domestic relations order issued here was not made pursuant to an Idaho domestic relations law. The spousal support agreement was not a part of the divorce decree, and Linda brought this as an action to enforce the contract.

This judgment of domestic relations order was issued pursuant to state contract law. The magistrate had no authority, in an action to enforce the contract, to impose the "QRDO to satisfy pending judgments for alimony owed by the Participant to the Alternate Payee." Judgment of Qualified Domestic Relations Order, at 1. Consequently, the magistrate erred in issuing this judgment of qualified domestic relations order. See *Davidson*, 154 Idaho at 232, 296 P.3d at 438: "Because the spousal support provision

of the parties' divorce settlement agreement was not merged into the divorce decree, it is enforceable in this action for breach of contract."

Linda asserts that her "right to alimony is grounded in Idaho's decisional domestic relations law-her concomitant right to enforce the judgments for unpaid alimony via the Magistrate Court's Order is likewise grounded in Idaho's decisional domestic relations law." Respondent's Brief, at 11. However, she has cited no specific authority for this assertion.² I.C. § 32-705 provides no absolute right to spousal support. Rather, section 32-705 specifies that spousal support can be ordered when the court finds that the specified conditions have been satisfied.³ The federal statute requires the qualified domestic relations order be "based upon a state domestic relations law." Neither Linda nor the magistrate point to a specific state domestic relations law that is applicable here.

²See *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) ("The argument shall contain the [party's] contentions with respect to the issues presented . . . the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon."); I.A.R. 35(a)(6); *City of Boise v. Bench Sewer District*, 116 Idaho 25, 26 n.1, 773 P.2d 642, 643 n. 1 (1988) (issue not fully briefed or argued is deemed abandoned).

³I.C. § 32-705 ("Maintenance") provides:

1. Where a divorce is decreed, the court may grant a maintenance order if it finds that the spouse seeking maintenance: (a) Lacks sufficient property to provide for his or her reasonable needs; and (b) Is unable to support himself or herself through employment.

2. The maintenance order shall be in such amounts and for such periods of time that the court deems just, after considering all relevant factors which may include: (a) The financial resources of the spouse seeking maintenance, including the marital property apportioned to said spouse, and said spouse's ability to meet his or her needs independently; (b) The time necessary to acquire sufficient education and training to enable the spouse seeking maintenance to find employment; (c) The duration of the marriage; (d) The age and the physical and emotional condition of the spouse seeking maintenance; (e) The ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance; (f) The tax consequences to each spouse; (g) The fault of either party.

Linda cites *Stinner v. Stinner*, 520 Pa. 374, 554 A.2d 45 (1989), in her brief in support of her argument. Respondent's Brief, at 10. That case holds that a "property settlement agreement, which provided, among other things, that . . . Mr. Stinner would pay Mrs. Stinner alimony in specified sums for the rest of her natural life or until she remarried,"⁴ could be the basis for a qualified domestic relations order. However, "[t]he decision does not indicate that the agreement was incorporated in the divorce decree in any manner"⁵ and the court finds the *Stinner* court's reasoning, based upon an interpretation of Pennsylvania law, not persuasive here. As previously noted above, in Idaho, "[w]hen a spousal support obligation arises only from a settlement agreement, the right to enforce the spousal support obligation rests on the contract." *Davidson*, 154 Idaho at 230, 296 P.2d at 436.⁶

The parties disagree over whether or not Idaho law allows a money judgment to be satisfied by attaching or garnishing a party's assets in a 401(k) plan. See, e.g., Appellant's Brief, at 8-10; Respondent's Brief, at 12-16. However, the court need not decide this issue because the judgment at issue is the "judgment of qualified domestic relations order."⁷ The court's "discussion of the [money judgment] issue would resolve

⁴554 A.2d at 47.

⁵*Hogle v. Hogle*, 732 N.E.2d 1278, 1282 (Ind. Ct. App. 2000).

⁶"An agreement providing for spousal support payments cannot ordinarily be modified by the court unless the terms of the agreement were incorporated or merged into the divorce decree. When the settlement agreement has been merged into the decree, support provisions in the agreement may be modified without the mutual consent of the parties because the agreement has become part of the court's judgment; absent merger, the agreement stands independent of the decree, and the obligations imposed under the agreement are not those imposed by decree but by contract." *Keeler v. Keeler*, 131 Idaho 442, 444-45, 958 P.2d 599, 601-02 (Ct. App. 1998) (citations omitted).

⁷See, e.g., Notice of Appeal (July 10, 2014), at 2 ("This appeal is taken from the Judgment of Qualified Domestic Relations Order filed on June 25, 2014, confirming Judgment, dated March 27, 2014.").

no actual controversy. We decline to issue advisory opinions.” *Carr v. Carr*, 108 Idaho 684, 690, 701 P.2d 304, 310 (Ct. App. 1985).

2. Attorney Fees

James seeks attorney fees on appeal, pursuant to I.C. § 12-121. “Attorney fees under section 12-121, Idaho Code, may be awarded by the court if the case was brought, pursued or defended frivolously, unreasonably, or without foundation.” *Kinghorn v. Clay*, 153 Idaho 462, 283 P.3d 779, 785 (2012) (citing I.R.C.P. 54(e)(1)).

“Fees under I.C. § 12-121 are not awarded to a prevailing party as a matter of right but, rather, are subject to the district court’s discretion. A district court should only award fees ‘when it is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.’ However, ‘when a party pursues an action which contains fairly debatable issues, the action is not considered to be frivolous and without foundation.’ A claim is not necessarily frivolous simply because the district court concludes that it fails as a matter of law. Furthermore, ‘a misperception of the law, or of one’s interest under the law is not, by itself, unreasonable. Rather, the question is whether the position adopted was not only incorrect, but so plainly fallacious that it could be deemed frivolous, unreasonable, or without foundation.’” *See Garner v. Povey*, 151 Idaho 462, 467-68, 259 P.3d 608, 613-14 (2011).

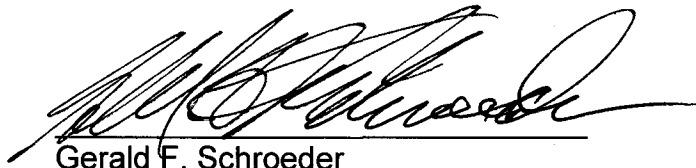
While James is the prevailing party, Linda’s defense in this appeal, which concerns an issue for which there is no published Idaho appellate case directly on point, was not frivolous, unreasonable or without foundation. James’ request for attorney fees is, therefore, denied.

Linda is not the prevailing party, and the court has found that issuance of the judgment of qualified domestic relations order was not proper. Her request for attorney fees on appeal will not be granted.

CONCLUSION

The decision of the magistrate court issuing the judgment of qualified domestic relations order is reversed. The requests of both parties for attorney fees on appeal are denied.

Dated this 24 day of December 2014.

A handwritten signature in black ink, appearing to read 'G. F. Schroeder', written over a horizontal line.

Gerald F. Schroeder
Senior District Judge

CERTIFICATE OF MAILING

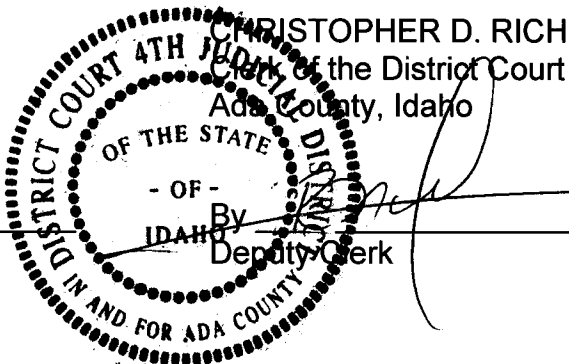
I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the OPINION ON APPEAL as notice pursuant to Rule 77(d) I.R.C.P. to each of the parties of record in this cause in envelopes addressed as follows:

C. THOMAS ARKOOSH
ARKOOSH LAW OFFICES, PLLC
PO BOX 2900
BOISE, IDAHO 83701

STANLEY W. WELSH
COSHO HUMPHREY LLP
800 PARK BLVD., SUITE 790
BOISE, ID 83707-9518

HON. PATRICIA YOUNG
VIA INTERDEPARTMENTAL MAIL

Date: DEC 24 2014



NO. _____
A.M. _____ P.M. 4:44

JAN 06 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

STANLEY W. WELSH ISB #1964
MATT SCHELSTRATE ISB #8276
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff/Appellant,

v.

JAMES A. KESTING,

Defendant/Respondent.

Case No. CV OC 1400258

NOTICE OF APPEAL

TO: JAMES KESTING, the above-named Respondent and his attorney of record C. Thomas Arkoosh, and the CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, LINDA C. KESTING, through her attorney of record Stanley W. Welsh of the firm Cosho Humphrey, LLP, hereby appeals from the OPINION ON APPEAL, entered December 29, 2014, by the Honorable Gerald F. Schroeder.

2. Jurisdictional Statement. The Appellant has the right to appeal to the Idaho Supreme Court. The Opinion on Appeal is an appealable Order under and pursuant to Rule 11(a)(2), Idaho Appellate Rules.

3. Designation of Appeal. This is an appeal from the District Court, which entered a decision on appeal from the Magistrate Division of the District Court.

4. Issues on Appeal. The preliminary issues on appeal which the Appellant intends to assert are:

- (a) Whether the District Court erred in reversing the Judgment of Qualified Domestic Relations Order on the grounds that it was not issued pursuant to state domestic relations law.

5. Transcript. A transcript is not requested.

6. Record. Appellant requests that those documents automatically included under Rule 28 I.A.R. be included in the Clerk's Record. Additionally, Appellant requests that the following be included in the record on appeal:

- (a) Appellant's Brief filed August 28, 2014
- (b) Respondent's Brief filed September 25, 2014
- (c) Appellant's Reply Brief filed October 17, 2014

7. Exhibits. No exhibits are designated.

8. Sealed Record. No order was entered sealing any part of the record.

9. I certify:

- (a) The estimated fee for preparation of the Clerk's record has been paid.
- (b) The appellate filing fee has been paid.

(c) Service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 6 day of January, 2015.

COSHO HUMPHREY, LLP



MATT SCHELSTRATE
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 6 day of January, 2015, a true and correct copy of the within and foregoing instrument was served upon:

C. Thomas Arkoosh
Arkoosh Law Offices
VIA FAX: 343-5456
P.O. Box 2900
Boise, Idaho 83701
Served by: Facsimile



MATT SCHELSTRATE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff-Appellant,

vs.

JAMES A. KESTING,

Defendant-Respondent.

Supreme Court Case No. 42875

CERTIFICATE OF EXHIBITS

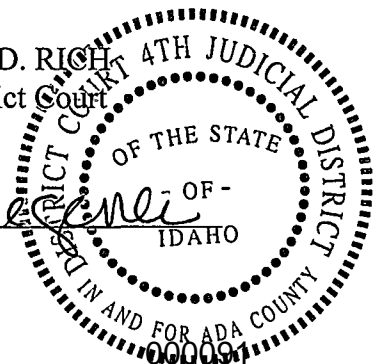
I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 19th day of May, 2015.

CHRISTOPHER D. RICH
Clerk of the District Court

By KW [Signature]
Deputy Clerk



CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff-Appellant,

vs.

JAMES A. KESTING,

Defendant-Respondent.

Supreme Court Case No. 42875

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

STANLEY W. WELSH

ATTORNEY FOR APPELLANT

BOISE, IDAHO

C. THOMAS ARKOOSH

ATTORNEY FOR RESPONDENT

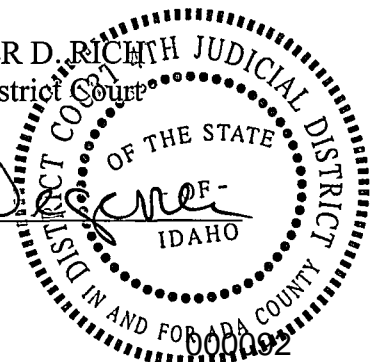
BOISE, IDAHO

Date of Service: MAY 19 2015

CERTIFICATE OF SERVICE

CHRISTOPHER D. RICH
Clerk of the District Court

By [Signature]
Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LINDA C. KESTING,

Plaintiff-Appellant,

vs.

JAMES A. KESTING,

Defendant-Respondent.

Supreme Court Case No. 42875

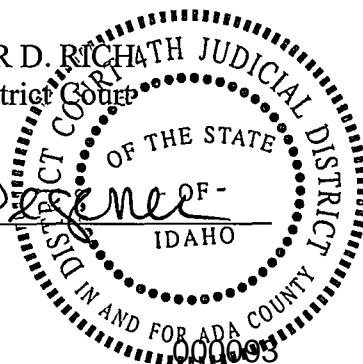
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 6th day of January, 2015.

CHRISTOPHER D. RICH, CLERK OF THE DISTRICT COURT
CLERK OF THE DISTRICT COURT

By KWegener
Deputy Clerk



CERTIFICATE TO RECORD